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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-408

KATHLEEN M. PIETRUNTI,
Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Kathleen M. Pietrunti hereby petitions for a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey.

Opinions Below

The opinion of the Appellate Division of the Superior Court is dated April 23, 1974, is reported in 128 N.J.

Super. 149, 319 A2d 262 and is set forth in Appendix A (1a). This judgment affirmed petitioner's dismissal from employment with the school district of the Township of Brick, Ocean County, New Jersey, directed by the Commissioner of Education of the State of New Jersey, which was affirmed by the New Jersey State Board of Education. The Commissioner's Decision is dated July 22, 1972 and is set forth in Appendix C (27a). The State Board's Decision is dated April 4, 1973 and is set forth in Appendix D (102a).

The order of the Supreme Court of New Jersey denying certification to review the decision of the Appellate Division of the Superior Court of New Jersey was rendered without opinion on July 22, 1974, and is set forth at Appendix B (26a).

Jurisdiction

The order of the Supreme Court of New Jersey denying certification (that is, refusing to entertain an appeal from the final decision of the Appellate Division of the Superior Court) was entered on July 22, 1974. The opinion of the Appellate Division of the Superior Court of New Jersey is dated April 23, 1974. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Whether a speech alone, without any demonstration of interference in the area in which the speech occurred, to wit, the school system of Brick Township, may be penalized because of its critical tone?

2. Whether the ambits of free speech as protected by the First and Fourteenth Amendments may be circumscribed because of petitioner's status as a professional person, to wit, a teacher?

3. Whether the dismissal of petitioner for her orientation day speech violated her First and Fourteenth Amendment rights of free speech as well as the First and Fourteenth Amendment rights of association of petitioner and those whom she represented as president of her local school association, legally recognized under New Jersey law (N.J.S.A. 34:13A-1 et seq., Public Employer-Employee Relations Act) as the collective negotiating agent of a unit of teachers employed by the Brick Township Board of Education?

4. Whether a superintendent of schools is such a public person so as to prevent penalty for public criticism of him when no malice is actually shown?

Constitutional and Statutory Provisions Involved

The applicable United States constitutional provisions are the First and Fourteenth Amendments and the First through the Ninth Amendments.

Article 1, paragraph 19 of the New Jersey Constitution and N.J.S.A. 34:13A-1 and more especially 34:13A-5.3. The texts of these provisions are set forth at Appendix B.

Concise Statement

Petitioner Kathleen M. Pietrunti began teaching in 1966 in Brick Township as a business education teacher in the high school. For some 4 years she had no particular relationship with the Superintendent of Schools, and in due course she attained tenure.

In 1970 she became a member of the grievance committee of the Brick Township Education Association, and

immediately her relationship with the Superintendent of Schools began to deteriorate. In April of 1971 she was elected to the presidency of the Association.

In February of 1971 an election was held for membership to the Board of Education, and one of the platforms of the incumbent president of the Board was that there were 11 teachers in the district whom he intended to get rid of if he were re-elected.

These 11 teachers became known as the "Brick 11", and the record reveals that petitioner had been identified by the president of the Board as one of the 11. Although petitioner did not become president of the Association until April of 1971, she was immediately compelled to insist upon meetings with the Board of Education to negotiate a new agreement to succeed the then current agreement which was due to expire in June of 1971. Her insistence was motivated by the fact that the Board of Education had refused for some 83 days to meet with the representatives of the Association.

A number of other aggravating instances took place between the Board of Education and the Education Association in which petitioner, as a newly elected president of the Association, became involved.

One of the great sources of irritation between the Board of Education and the Association dealt with the refusal of the Board to re-hire two non-tenure teachers, despite the favorable recommendations of their superiors and principal. The refusal to re-hire apparently was based upon the advice of the Superintendent of Schools. Ultimately an arbitrator ruled that the Board had violated the agreement with the Association and directed the payment of lost compensation with such other rights as may have accrued to the two teachers involved. The Board

has instituted litigation to set aside the arbitrator's finding.

Petitioner, who had up until a relatively short period before never been involved in this kind of relationship with a board of education nor with the obligations thrust upon her as president of the Association, found herself constantly engaged in attempting to uphold the rights of the Association as well as of the individual members.

Apparently neither the Superintendent of Schools nor the Board of Education had had any real experience in dealing with organized groups of its employees, and especially with a group which had the temerity to suggest that rights conferred upon it by law must be observed. The record reveals that prior to September 1 of 1971 there was a period of agitation between the Superintendent of Schools and various members of the Association, including petitioner. Typical of the reaction by the school administration and of the role played by the Superintendent was the fact that he signed a letter to one of the teachers "Machiavelli", a not inappropriate autobiography. The president of the Board of Education referred to the period as "one of heartburn".

On September 1, 1971, petitioner as president of the Education Association was invited to address an orientation day meeting of new teachers, and on that occasion delivered the address which forms the most important part of the issue under scrutiny here.

Following that address the Board of Education filed charges with the Commissioner of Education alleging the address as ground for dismissal from petitioner's tenured position as a teacher, and later amended the charges to include other acts mainly committed long before September 1, 1971, which had never been made the subject matter of any complaint in the past.

The Commissioner of Education determined that the September 1st, 1971 address alone merited discharge, and that opinion was concurred in by the Appellate Division of the Superior Court.

A petition for certification was filed with the New Jersey Supreme Court, and certification was denied. The Supreme Court of New Jersey, by refusing certification, thus left standing the ruling of the Appellate Division without reviewing or hearing oral argument on the case. The jurisdiction of this Court to review the case on a petition for certiorari rests on 28 USC §1257 (3).

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner's dismissal as a tenured teacher for making the September 1, 1971 orientation day speech violates her First and Fourteenth Amendment rights.

This Court has dealt with the problem of resolving the interests of a public employer in regulating the speech of its employees in terms of carrying out the public functions of the State as against the principle that public employees do not surrender constitutional rights in accepting public employment. There are many conflicting cases in the various circuits dealing with the problem, as well as in the State courts, and this Court's delineation of the proper applicable principle as set out in *Pickering* v. *Board of Education,* 391 U.S. 568 (1968) requires further treatment.

In *Pickering, supra,* a teacher published a letter (annexed to the Court's opinion) in a local newspaper criticizing both the school board and the superintendent of

schools with respect to the raising of money and the expenditures thereof, and included in that letter charges that the superintendent precensored teachers' publications and conducted a totalitarian school system. The letter was extremely critical in charging fraudulent, undemocratic, intimidatory and illegal actions by both the school board and the superintendent.

This Court, in dealing with charges that the letter defamed the members of the board and the superintendent and was detrimental to the efficient operation and administration of the schools of the district, reversed his dismissal.

In the course of its discussion this Court pointed out that, contrary to the findings below, the factual matters contained in Pickering's letter were substantially correct.

In the instant case in the opinion below the Appellate Division stated:

> "It is in this connection that we should also observe that the question of the truth or falsity of the claims made in the speech by appellant are not in reality the issue before us; rather we are concerned with the timing and the reckless, intemperate nature of the deliverance."

It is undenied that petitioner was present at the orientation day meeting as a representative of her Association pursuant to the terms of the agreement between the Board and the Association. Her delivery of a speech was therefore contractually provided. Petitioner asserted that all of the charges she made against the Superintendent were true, and petitioner still believes them to be true and to have been proven during the course of the hearings below. The New Jersey court seems to take the position that even though the charges may have been

true, that they should not have been made at the particular place and in the style in which they were made. The court also stated that petitioner's argument that the Board could not prove that her speech had any significant disruptive effect on the school system was a misconception.

> "The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of the educational system."

We submit that the *Pickering* test requires a demonstration of fact in some manner or other, however minimal, that the action complained of prevented the State from carrying out an essential function before speech may be curtailed, and an a priori judgment that certain speech may be penalized without any demonstration of objective effect violates the *Pickering* principle.

The notion of the New Jersey court that the issues in *Pickering* were more public than those in the case below, we submit, is totally invalid. Petitioner dealt with the subject matter of the hiring of black teachers, the banning of books from the library, the imposition of penalties upon a teacher for speaking critically about the school system, about conduct of the Superintendent in becoming involved in political issues, thus beclouding his position as an impartial educator in a school system, and the Superintendent bedeviling teachers because of certain facts in their personal lives. Certainly these were not less public issues within a community than the allegation of misuse of funds dealt with in *Pickering* or the allegation that the superintendent there prevented teachers from publishing letters unless he approved of them, or the alle-

gation that the school board had misled the public and engaged in fraudulent conduct.

It is submitted that petitioner's argument, as recited (and rejected) in the Appellate Division's opinion:

> "The first, that the local board of education could not prove that any action by her had any significant effect on the school system in that not a single teacher gave up teaching as a result of any action taken by her, not a single person was induced not to apply for a teaching position in the system as a result of any action taken by her, and not a single student was in any way influenced by any action taken by her.",

is a sound argument and demonstrates the teaching of *Pickering* and should receive the further instructions of this Court.

POINT II

Does petitioner forfeit her rights of free speech as protected by the First and Fourteenth Amendments because of her status as a professional person, to wit, a teacher?

The Appellate Division determined that, although petitioner might legally and constitutionally believe that the Board of Education and Superintendent of Schools were not carrying out their functions properly and could therefore speak out publicly with respect to such belief, that the exercise of this right has to be accomplished "professionally".

> "A teacher is expected to show a reasonable respect for the authority of his or her employer and

> to maintain a civility commensurate with his or her professional status."

This Court has on innumerable occasions enunciated the principle that the rights of free speech are paramount to civility and refined expression. As the Court made clear in *Papish* v. *University of Missouri*, 410 U.S. 667, 35 L. Ed.2d 618, 93 S. Ct. 1197 (1973):

> "The First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."

As Mr. Justice Harlan pointed out in speaking for the court in *Cohen* v. *California*, 403 U.S. 15, 29 L. Ed.2d 284, 91 S. Ct. 1780 (1971):

> "The State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."

Yet, to paraphrase the language of *Tinker* v. *Des Moines Indiana School District*, 393 U.S. 503 (1969), the opinion below would have teachers forfeit their constitutional rights when they enter the class room.

We submit that there are no professional persons' restrictions on the use of free speech as against a non-professional exercise of such right, and that to set up such a standard raises grave constitutional problems.

POINT III

Petitioner's dismissal because of her orientation day address, delivered as president of her association, violates petitioner's First and Fourteenth Amendment rights of association, as well as those whom she represented as president of said association.

Petitioner was the duly elected president of the Brick Town Education Association, the recognized collective negotiating agent for the teachers employed by the Brick Township Board of Education. The right of association for such purposes is given by the New Jersey Constitution, Article I, Section 19, and N.J.S.A. 34:13A-1, Chapter 303 of the Laws of 1968 (Appendix B).

In that connection she was present, pursuant to the terms of the agreement between the Board and the Association, at an orientation day meeting for new teachers in the system, and the charges preferred against her for making the address recites the fact that she made the address as president of the Association. For the school Board to be able to penalize her for making this address is obviously to prejudice and mortally diminish not only petitioner's right of association, but also that of the other members of the Association. If the Board may penalize, by the most drastic penalty in the employer-employee relationship, to wit, dismissal, because of petitioner's conduct in representing her fellow employees, then the right of association is severely curtailed. Petitioner was not present at the orientation day meeting as a teacher, for that meeting was limited to new teachers only. She was there in her capacity as president of the Association to explain the relationship between the Board and the Association. She felt deeply that the relationship was not a good one and that the Superintendent

of Schools had been one of the main causes for the deterioration in that relationship. As we have pointed out before, this speech had no effect whatsoever on the running of the school system. It undoubtedly offended the Superintendent, but the charges against petitioner which led to her dismissal were brought against her because she had improperly conducted herself as president of the Association. The penalty that was imposed against her was dismissal from her teaching position. The judgment that was therefore rendered was that as a teacher she should not have conducted herself in a certain manner as president of the Association, thus setting up the Board of Education as a censor and judge of conduct of officers of the Association. If that power of a board were to be upheld, then its chilling effect on the rights of association becomes obvious. In the relationship in which petitioner spoke at the orientation day meeting she was dealing with a labor-management relationship.

This Court has recognized that that relationship is often accompanied by hostile and adversary speech and symbols, and pointed out, in *Letter Carriers* v. *Austin*, —— U.S. ——, 41 L. Ed. 2d 745, 94 S. Ct. —— (1974), that labor relations are very often accompanied by vituperation, personal accusations, misrepresentations and distortions, and that the same tolerance which characterizes labor relations in the private sector should characterize labor relations in the public sector. Obviously, if the employer can exercise a weapon terminating the employer-employee relationship, the right of association must be severely curtained and a nonconstitutional restriction on free speech imposed.

See, also: *McLaughlin* v. *Tilendis*, 308 F2d 287 (CCA 7, 1968); and *AFSCME* v. *Woodward*, 406 F2d 137 (CCA 8, 1969).

There is hardly a speech made by a union leader with respect to his employer which the employer does not regard as unfair, false, partisan and uncivil, yet the interest in both promoting the right of association and free speech prohibits an employer from retaliation; and we submit that in the instant case the very fact that the charges were brought against petitioner as president of her Association was a clear attempt to restrict associational rights of both petitioner and the other members of the Association.

POINT IV

The Superintendent of Schools is such a public person so as to prevent penalties for public criticism of him by a teacher when no malice is actually shown.

There can be no question that the criticism made by petitioner of the Superintendent of Schools, for which criticism she was dismissed, was sharp and caustic. It is equally true that petitioner believed all of her remarks to be absolutely true, and there has been no demonstration of any personal malice as the basis for these comments. The truth of the criticism is best demonstrated by the fact that with respect to one of the items, wherein petitioner had charged the Superintendent with invalidity causing the dismissal of two non-tenured teachers, an impartial arbitrator upheld petitioner's position and directed that the teachers involved be made whole for any loss they may have sustained. The Board has appealed from this determination.

The Board, in attempting to show some consequence of this speech, was totally unable to do so and, as we have pointed out, the Appellate Division rejected the notion that any objective consequence need be shown. The Su-

perintendent of Schools, in testifying in an attempt to show some consequence, was forced to retract his original testimony, and petitioner's charge in all the proceedings below that that original testimony was a blatant falsity has never been challenged by the Board. However, the Superintendent of Schools was the person entrusted by the Board with the administration of the school system, and involved himself in all the matters in dispute here, and we submit that within the teaching of this Court, as demonstrated by *Gertz* v. *Welsh*, —— U.S. ——, 41 L. Ed. 2d 789, 94 S.Ct. —— (June 25, 1974), the Superintendent of Schools was a public figure who could not have sustained a defamation suit absent knowledge of a reckless disregard of the falsity of the alleged defamatory statements. We have already pointed out, supra, the privilege which should exist for the broadest recognition of the rights of free speech in the labor-management area. We also submit that petitioner as a citizen of the community had a right to comment on the performance by the Superintendent of Schools without incurring the dangers of a defamation suit. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed. 686, 84 S.Ct. 710; *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 18 L. Ed.2d 1094, 87 S. Ct. 1975 (1967).

If the Superintendent would be barred from seeking relief by way of damages from petitioner, if she were a private citizen, permitting him to discharge petitioner acts as a similar restraint on speech. Certainly the Superintendent was a public figure, and beyond all question the matters discussed by petitioner were matters of public and general interest within the meaning of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed.2d 296, 91 S. Ct. 1811 (1971). It should not be overlooked that, although petitioner herself came to the conclusion that she should apologize for making the address, and did so

within a week, an apology found to have been sincerely made by the Hearing Officer in the case, the Superintendent was at liberty to answer petitioner, had he chosen to do so, during the orientation day proceedings. Finally, the content of petitioner's address was completely restricted to education and educators. It did not deal with any matter outside of the Superintendent's role qua Superintendent of Education, and the comments were made only to whose whom the Association was duty bound to represent as part of the recognized unit.

We submit that to permit petitioner to be discharged in this context would insulate public officials and public figures from the legitimate implications of the constitutional exercise of free speech.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

EMIL OXFELD
Attorney for Petitioner

[APPENDICES FOLLOW]

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

Argued January 29, 1974—Decided April 23, 1974.

Before JUDGES HALPERN, MATTHEWS and BISCHOFF.

On appeal from determination of the New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (*Messrs. Rothbard, Harris & Oxfeld*, attorneys).

Mr. Martin B. Anton argued the cause for appellee (*Messrs. Anton and Ward*, attorneys; *Mr. Donald H. Ward*, on the brief).

Mr. Gordon J. Golum, Deputy Attorney General argued the cause for the State Board of Education (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. George F. Kugler, Jr.*, former Attorney General of New Jersey, and *Mr. Stephen Skillman*, First Assistant Attorney General, of counsel).

Mr. Thomas P. Cook argued the cause for New Jersey School Boards Association and New Jersey Association of School Administrators, *amicus curiae* (*Messrs. Cook* and *Knipe*, attorneys).

PER CURIAM

This is an appeal from a decision of the Commissioner of Education, affirmed by the State Board of Education, dismissing appellant, a tenured teacher, from her employment with the Brick Township Board of Education, effective on the date of her suspension by the local

Appendix A

Board of Education on September 8, 1971. Appellant also appealed from the determination of the State Board of Education which reversed the decision of the Commissioner which had granted to her compensation at her regular salary retroactively to the date of her suspension, under the provisions of N.J.S.A. 18A:6-14, as amended by L. 1971, c. 435, §2, effective February 10, 1972.

Appellant became a member of the faculty in the Brick Township School District as a business education teacher in the high school in 1966. Her career was uneventful until 1970, when she became a member of the grievance committee of the Brick Township Education Association. During that period she apparently had some difficulties in her relationships with the superintendent of schools. Appellant became president of the Education Association in April of 1971. The record shows that as of that date, the local Board of Education had been dilatory in obligations to bargain collectively with the association and had refused to meet with the association for a period of 83 days. Efforts were then ongoing to negotiate a new bargaining agreement since the current agreement expired on June 30, 1971. Negotiations subsequently resumed, however, and a new agreement was successfully negotiated prior to the opening of the new school term in September 1971.

During the latter part of August 1971, appellant was invited by the school district administration, as the president of the Brick Township Education Association, to be one of the speakers at an orientation meeting to be held on September 1, 1971. A speech was given, and that speech, as delivered, generated the principal charges made against appellant by the local Board of Education. The undisputed evidence discloses that appellant

used the occasion of the orientation meeting to speak aganist the school administration in general and against the superintendent of schools in particular. Rather than insert excerpts from the speech throughout this opinion, we have attached hereto, as an appendix, the speech delivered in its entirety.

As a result of the speech, appellant was charged in ten written charges with conduct unbecoming a teacher, insubordination, and conduct subversive of the discipline and morale of the school system. Her references to the dismissal of two non-tenured teachers (Charge 1), the suspension of a fellow teacher (Charge 2), the removal of three books from the English curriculum (Charge 4), the lack of black teachers, and the characterization of the superintendent of schools as a villain (Charge 5) were alleged by the local Board as conduct unbecoming a teacher. Her reference to the dismissal of the two non-tenured teachers (Charge 1) was alleged as an instance of insubordination to the office of superintendent of schools. Her references to the suspension of the fellow teacher (Charge 2), the claimed involvement of the superintendent of schools in local politics (Charge 3), the removal of books, and the dearth of black faculty (Charge 4), her description of the school system as a "snakepit for young teachers" (Charge 6), her suggestion to non-tenure teachers to refrain from any criticism until they have tenure (Charge 7), and her description of the district's hiring practices as a "callous economic gesture" (Charge 8) were alleged as instances of conduct subversive of the discipline and morale of the school system.

As a result of these charges, appellant was suspended from her teaching duties on September 7, 1971, effective September 8, 1971. On the same date, she gave a public apology for her orientation meeting speech of September

Appendix A

1, distributing copies of the speech to all who were present to hear her apology. After her suspension, 10 additional charges were preferred. In these charges, appellant's actions as a tenured teacher and president of the Brick Township Education Association were alleged to represent an attitude of insubordination which foments disrespect for the office of superintendent and usurpation of administrative functions. A direction claimed to have been issued by appellant to the faculty urging them to refuse to comply with an administrative request to file letters with respect to individual teacher's intentions for the succeeding year; her public expression of concern that administrative vacancies existed; her suggestion that the faculty file letters of intent in language suggested by her; her letter questioning the dismissal of a non-tenured teacher, authorship of a bulletin regarding this teacher and a letter directed to parents of students on the subject; and an association directive dealing with teachers' duties, were all cited for bases for this charge. (Charge 9 was found by the hearing officer to constitute a legal summation rather than a charge, thus requiring no defense.) The release of a news bulletin calling for arbitration of the non-renewal of the contracts of two non-tenured teachers (Charge 11), the purported misrepresentation of the presence of the President of the Board of Education at a meeting between the superintendent and association representatives (Charge 12), the purported misrepresentation of the cancellation of a meeting requested by the New Jersey Education Association with the administration (Charge 13), and the reference to the superintendent of schools as "Carmen" rather than "Stephen" (Charge 14), were alleged in support of claimed insubordinate and vindictive conduct subversive of the discipline and morale of the school system. A disagreement over

Appendix A

the insufficiency of a lesson plan, and a reply of "shove it" to an observation by the subject supervisor that she was late for class (Charge 15) were alleged as instances of insubordination, refusal to accept administrative authority, and conduct unbecoming a teacher. The claimed insincere apology for the September 1 speech made on September 7, 1971 (Charge 16), an alleged statement of purpose to rid the school system of the superintendent (Charge 17) were alleged as indicia of a philosophy incompatible with the school system. The uttering of various "unladylike and unfeminine" remarks in places of public accommodation, such as, "elementary teachers have elementary minds," "C. *Serpent* Raciti," (referring to the superindent, C. Stephen Raciti), "This paper is so poor it is not good enough to wipe my ass," "You son-of-a bitch, you did that on purpose," "Ding Dong Bell," "bald headed mental midget" and "bald-headed bastard," the latter three statements referring to Board President, William Bell, were alleged as subversive of the discipline and morale of the school district (Charge 18). A bulletin critical of another teacher which was claimed to have been "enforced and/or condoned" by appellant was alleged as subversive and unbecoming conduct (Charge 19). Finally, a remark to another teacher in the course of a reprimand was alleged as an instance of interference with supervisory duties. (Charge 20).

Hearings before a hearing officer designated by the Commissioner of Education began on January 17, 1972 and concluded on April 12, 1972. There was no dispute in the testimony adduced over the fact that the language complained of in the first eight charges was uttered by appellant. The hearing officer determined the question of fact to be whether the statements uttered and complained of were true in fact, and whether the orientation meeting was the proper forum for these remarks.

Appendix A

The hearing officer filed a detailed report with the Commissioner. For the purposes of this opinion, we find it necessary to give a brief summary of his conclusions. As to charge one, he found that there was no basis for appellant's statement that the two teachers were "fired," although this may be the common understanding and the practical effect of the action of the Board of Education on persons who may not be versed in the technical ramifications of school law. As to charge two, he made no specific findings of fact with respect to the core of the charge per se, finding solely that the subject of the incident was inappropriately raised by appellant. In reaching this conclusion, the hearing officer makes the suggestion that the local Board of Education may have been culpable itself in handling the subject matter which was referred to by appellant. Charge three, which related to alleged local political activity by the superintendent, was left by the hearing officer to the Commissioner's judgment as to whether the minor instances of political encounter found to have been indulged in by the superintendent were such as to be deleterious to his role as educational leader. He also left for the determination of the Commissioner whether appellant's inclusion of such allegations represented conduct unbecoming to a teacher in the public schools.

The hearing officer saw fit to break charge four down into three subcharges: the first, that appellant attempted to usurp the authority of the Board when she charged that they arbitrarily yanked books from the English curriculum; the second, the innuendo raised by appellant that the administration had a racist hiring policy; and the third, that the superintendent violated confidences of the grievance procedure. The first subcharge was found to be without merit, and the hearing officer found that no evi-

dence was presented at the hearing which confirmed even an inferred premise of racial discrimination by the Board. As to the third subcharge, the hearing officer left the determination as to whether or not the orientation day ceremony was a proper forum for its expression, suggesting also that the Commissioner determine whether the pertinent part of appellant's speech was factually based in truth or in her belief. The hearing officer concluded that the assumptions and inference drawn by the local Board in charge five were unwarranted, and that it was unjustifiable to conclude that appellant's use of the word "villain" was to be given its full Shakespearian connotation. Charge six was sustained, leaving to the Commissioner the question of the propriety of the words used as a part of the speech. Charge seven, which dealt with advice to non-tenured teachers, was found by the hearing officer not to require a finding of fact but a value judgment by the Commissioner. The hearing officer found little factual support for charge eight which charged the respondent with seriously interfering with the administration of the school system, pointing out that there was no concrete evidence of any kind that the orientation day speech ever served as an "interference" per se to the school administration, or that new teachers resigned their positions because of it.

The hearing officer also reviewed the additional charges served on appellant subsequent to her suspension. He found that the activities of appellant were in fact as alleged in charge 10, but the effect on the school district was left to the judgment of the Commissioner. Charge 11 was withdrawn by the Board. The hearing officer found that in fact the president of the local Board was an intruder in a meeting between the superintendent and the association and, therefore, recommended a dismissal of charge 12.

Appendix A

The claim that the Superintendent of Schools dozed in court during proceedings, and the reference to him in a letter as "Carmen" were found to be of such minor consequence that they need not be considered by the Commissioner as substantial evidence against appellant. Charge 15 which related to her relations with her subject supervisor were ordered dismissed by the award of an arbitrator after the hearings, and the hearing officer's report thereon. The fact of the arbitrator's award and its contents were forwarded to the State Board of Education before it reviewed the Commissioner's determination. Because of the award, the State Board eliminated charge 15 from consideration of the charges against appellant. We have not considered this charge in our review.

Charge 16 which alleged that the apology for the orientation day speech was insincere, was recommended to be dismissed. The hearing officer found in charge 17 that appellant probably did say words to the effect that the superintendent has "got to go" in private conversation with the assistant superintendent of schools. He recommended, however, that all other inferences and facets of this charge be dismissed. In charge 18, the hearing officer properly made no finding that the words attributed to appellant were "unfeminine" or "unladylike." He did find that appellant used the expressions "son-of-a-bitch" and "bald headed mental midget." Charge 19, which related to criticism of a fellow teacher, was recommended as dismissed for want of real evidence. The final charge which dealt with the interference with the performance of a teacher's duty, was found to be undisputed since the supervisor involved admitted he had no authority to direct the teacher involved to perform the task assigned. The hearing officer left any final conclusion with the Commissioner.

The Commissioner, for the greater part, accepted the hearing officers' report. He found that the evidence sus-

tained several charges against appellant which were of a sufficiently serious nature so as to warrant her dismissal. With certain specific exceptions, which he noted in his decision, he sustained the charges of the local Board relating to the orientation day speech. He also upheld, with certain exceptions, the charge that the speech contained untruths and distortions, and found that it constituted a derogatory personal indictment of the Superintendent of Schools which had been presented in the wrong forum and was patently unfair to him.

Certain of the charges unrelated to the orientation day subject were also sustained by the Commissioner. In this group of charges he determined charges 10A, 10C, and 18D to be the most serious. The first of these charged that appellant, as President of the Education Association, had directed tenured teachers not to sign letters of intent which sought information as to whether those teachers plan to return to the school district for the fall semester. Charge 10C was related to charge 10A since it charged that the letter in question interfered with the administrative rights and duties of the Superintendent of Schools. In sustaining these two charges the Commissioner found that appellant was guilty of insubordination and that her action, if followed by a majority of the tenured teachers, could have crippled the effective operation of the school district. Charge 18D involved the incident in which appellant called another teacher a son-of-a-bitch in the presence of students. The Commissioner reviewed a claim of provocation and found this incident to be evidence of conduct unbecoming a teacher.

It was the Commissioner's conclusion that the orientation day speech, standing alone, warranted appellant's dismissal from the Brick Township School District. It was the Commissioner's opinion that the constitutional obligation of local boards of education to provide a

thorough and sufficient system of public education could not be carried out in an atmosphere of turmoil and conflict between school officials and employees. He stated:

> When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premediated and calculated manner (the speech, p-1) the Commissioner believes that the tenure rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.

The Commissioner determined that the appellant should be dismissed from her employment with the Brick Township School System, effective on her date of suspension by the Board of Education on September 8, 1971.

Following the Commissioner's determination, an appeal was filed with the State Board of Education and on April 4, 1973 that body affirmed the Commissioner's decision dismissing appellant. The decision of the State Board of Education also reversed that portion of the Commissioner's decision which granted appellant full pay retroactive to the 121st day after her suspension, as noted above.

Before discussing the substantive matters before us on this appeal, a procedural point must be dealt with. Appellant claims that the Commissioner violated provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1, *et seq.*, by not affording the parties an opportunity to object to the report of the hearing officer before he is-

sued his decision. (See N.J.S.A. 52:14B-10(c)). Unquestionably, the failure to provide this opportunity was erroneous and not in accordance with the provisions of the Administrative Procedure Act. *Winston* v. *Bd. Ed. So. Plainfield,* 125 N. J. Super. 131, 138 (App. Div. 1973). The right to object to a hearing officer's report made by one for the use of another who was entrusted with final decision making, who must rely in part, at least upon that report, has long been embedded in our jurisprudence. See *Mazza* v. *Cavicchia,* 15 N. J. 498, 523-524 (1954). We have recently held in *Winston,* above, that this axiom of administrative due process is applicable before the Commissioner of Education. In answering this argument, the Attorney General informs us that after our decision in *Winston* was handed down, he advised appellant, through counsel, that his office would be agreeable to a remand of these proceedings to the Commissioner for the purposes of allowing the parties to file exceptions to the hearing officer's report. This offer was declined by counsel for appellant. The Attorney General now contends that the refusal constitutes a waiver of the objection to the procedure employed by the Commissioner in this case. Under the circumstances existing, *i.e.* the lengthy hearings and the period of time elapsing between the filing of charges and the action of the State Board of Education, we see no point in becoming involved in a procedural predicament. We have elected to consider the arguments raised by appellant and the other parties on appeal as objections to the hearing officer's report, and have undertaken to review the entire record and that report in light of the arguments raised. We adopt this procedure in this case because of the public nature of the question involved and the desire of all parties to bring an early termination to these proceedings. We trust that in the future the

Commissioner will observe the provisions of N.J.S.A. 52:14B-1 *et seq.*

It is our conclusion that the fact of delivery of the orientation day speech by appellant, considering its content, was sufficient in itself to warrant her dismissal from employment by the school district of Brick Township. And while we affirm the decision of the State Board of Education insofar as it affirmed the allegations of the Commissioner, we find that the sustaining of the additional charges by the Commissioner and the State Board serve to strengthen the basic conclusion that appellant's irresponsible conduct on September 1, 1971 rendered her unfit to continue as a faculty member of the Brick Township School System.

Throughout appellant's arguments for reversal, two basic misconceptions exist. The first, that the local Board of Education could not prove that any action by her had any significant effect on the school system in that not a single teacher gave up teaching as a result of any action taken by her, not a single person was induced not to apply for a teaching position in the system as a result of any action taken by her, and not a single student was in any way influenced by any action taken by her. The second is that the conduct complained of must be considered in the context of a struggle by her seeking adjustment of the conduct of "Boards of Education, Superintendents of Schools and other administrative personnel" to the role which the collective bargaining agents of their teachers have by law been authorized and obligated to assume. We believe both of these basic assumptions exhibit a misconception of the role of a teacher in a school district and the role of a teacher as a negotiator for collective bargaining rights for school district employees. In any event, the issue before us is

the conduct of appellant as an individual employee of the Brick Township School District.

Appellant's first main argument is that the Commissioner overlooked the relationship between Brick Township Board of Education and the Brick Township Education Association of which appellant was president prior to the orientation day exercises. She contends that the speech which she delivered at those exercises was nothing more than a "culmination of frustration and provocation caused by the failure of the Board and Superintendent to live up to their legal responsibilities." Examples of this failure are said to be demonstrated by the administration permitting 83 days to elapse without any attempts at collective bargaining with the Education Association. Assuming for the sake of argument, that these allegations are true, and we observe that the evidence does point to a certain amount of truculence to negotiate on the part of the Board, we cannot conclude that the situation gave the right to appellant to resort to abusive rhetoric contained in the orientation day speech. We cannot conceive of any legitimate excuse for such unprofessional conduct. Appellant's attempt to cloud the issue by urging that she was legally bound as president of the association to represent its "rank and file" vigorously and with good faith is a non sequitur. Labor negotiations are not the subject matter of these proceedings.

The fact that appellant was the president of the education association did not give her leave or power to resort to the remarks which she did. *Puentes* v. *Bd. of Education of Union Free School District No. 21 of Town of Bethpage*, 302 N. Y. S. 2d 824, 826, 250 N. E. 2d 232, motion for reargument dismissed 305 N. Y. S. 2d 148, 252 N. E. 2d 628 (Ct. of Appeals 1969). Indeed, it should be fairly apparent that efficient leadership would eschew

a public attack such as that contained in the complained of speech. If in fact the administration of the school district improperly conducted its relationships with the teachers' association in the area of collective bargaining, that fact in itself cannot be held to justify improper conduct by the teachers or their representatives. A civilized society expects one who believes himself wronged to resort to legal channels in seeking redress and not to resort to trial by battle. It is in this connection that we should also observe that the question of the truth or falsity of the claims made in the speech by appellant are not in reality the issue before us; rather, we are concerned with the timing and the reckless, intemperate nature of the deliverance.

One final observation should be made with respect to the orientation speech and the charges arising out of it. The hearing examiner found that charge 16 was unproven and, therefore, required no defense. That charge related to the apology purportedly made by appellant on September 7, 1971 for her orientation speech. The Board charged that the apology was insincere, basing its claim on subsequent remarks of appellant, as well as the fact that she caused to have copies of the speech distributed at the time her apology was delivered. While the Commissioner never explicitly indicated that he accepted the recommendation of the hearing officer that charge 16 be dismissed, we deem this to be irrelevant in review of our conclusion that the speech as composed should never have been delivered at the orientation meeting or in public at any other time. It is our opinion that any apology under the circumstances could not have served to rectify the situation created solely by appellant by her exercise of poor judgment in making the speech in the first place.

Appellant's next argument is that she never usurped any essential function of the Board of Education. This argu-

ment relates to the matters described in charges 10A and 10C. It will be recalled that the Superintendent of Schools had circulated a questionnaire to the tenured faculty seeking to learn their individual intentions with respect to returning to employment in the ensuing year. Appellant sent a notice to those faculty members urging them not to comply with the superintendent's request because the faculty should not do anything that would make the Board's job any easier. The Commissioner found this act of appellant's to have been potentially disruptive of the school district. Appellant now argues in effect that it was beyond the power of the Commissioner to sustain these charges since the superintendent is nowhere given "legal warrant" for the action which he took in soliciting information with respect to teacher return. It is argued that there is no specific statutory authority for this sort of procedure. The argument is clearly frivolous. As a matter of common sense and prudence, a superintendent would take such action to find out just how many teachers he would have in the coming year and how many new teachers he would have to seek to fill vacancies that will be created. The authority to circulate such a questionnaire is implicit in the duties of the office of superintendent. On the other hand, appellant had absolutely no right as an individual teacher, or as a self-styled labor leader, to adopt the obstructionist attitude that she did in encouraging the faculty not to respond. We agree with the Commissioner that her irresponsible act was potentially dangerous to the entire school district. That nothing came of her attempts is irrelevant; although we find it significant that the faculty evidenced their maturity by ignoring appellant's suggestion.

Appellant also contends that the Commissioner by his determinations invalidly thrusts upon her a duty and burden for which there is no basis in law. This argu-

ment arises out of the Commissioner's conclusion in which he states:

> • • • The proofs herein provide little reason to believe that respondent has, in the past, or could in the future, be seriously interested in aiding the Brick Township Board to provide the "thorough and efficient" school system required by Constitutional prescription.

This conclusion is questioned principally because, it is argued, the Commissioner gives no authority, either statutory or case law, for this requirement. It is claimed that the Commissioner has concocted some kind of duty which is new and novel and which would raise grave constitutional questions if upheld. We see no constitutional difficulty with the Commissioner's conclusion, which, incidentally, appellant argues out of context. The answer is pure and simple: A teacher is something more than a classroom automaton. A teacher is a professional who has by education and training obviously dedicated himself or herself to the education of youth. A teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the educational goal. Appellant would relegate a teacher to a "rank and file" member of an organization who seeks some communal goal of self-aggrandizement. It is the individuality that each teacher brings to the educational scheme that contributes to educational success; that individuality, however, must be sublimated to the educational goal. A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status. All of this we find to be implicit in the Commissioner's quoted conclusion. Appellant's resort to billingsgate, and other

questionable conduct found by the Commissioner, tends to show that she has failed to meet even the minimum professional standards expected of her. We do not suggest that any teacher may not legally or constitutionally believe that a board of education or a superintendent of schools is not carrying out their functions properly, and may not speak out publicly with respect to such belief, or resort to political activities to defeat the members of such a board of education. These are rights which need not be emphasized since they are inherent in our democratic process. Indeed the failure to exercise such rights, on proper occasion, might well constitute unprofessional conduct. What we do suggest is that the exercise of these rights be accomplished professionally.

Appellant's final argument dealing with the Commissioner's findings is that they deprive her of her constitutional rights and liberties. The argument is premised on the observation that "it is commonplace that teachers do not forfeit their constitutional rights merely because they are teachers." We agree. But we observe at the outset of this discussion that neither the constitutional right of a teacher to speak freely on public issues nor the statutory right of school employees to bargain collectively for their own welfare, will override the basic obligation of an employee to the employer. Free speech and collective bargaining rights do not endow a teacher, as a school district employee, with a license to vilify superiors publicly. The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of the educational system. *Breen* v. *Larson College,* 137 Conn. 152, 75 A. 2d 39 (1950); *cf. Marchitto* v. *Central R. Co. of N. J.,* 9 N. J. 456 (1952).

In advancing her constitutional argument, appellant relies on *Pickering* v. *Board of Education,* 391 U. S. 563

(1968). In *Pickering*, the teacher had written a letter to the editor of a local newspaper criticizing the manner in which his board of education and superintendent of schools had handled past proposals to raise new revenue from the public for defendant school system. Essentially, the letter complained that too much money was being sought for the athletic program, and not enough money for teachers' salaries. The letter also charged the superintendent of schools with attempting to prevent teachers in the district from imposing or criticizing the proposed bond issue. The teacher also charged that the board of education was "trying to push tax supported athletics down our throats," and that certain actions of the superintendent created a climate of "totalitarianism" in which teachers lived at the high school.

The Supreme Court held that the letter did not justify the teacher's dismissal, and that its contents and publication were protected by the First Amendment. The court observed:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In concluding that the balance there rested on the side of the teacher, the court noted, among other things, that the issues discussed in the letter were matters of public

importance and concern; and that the public interest in having free debate on such matters permitted the teacher to make statments thereon—even if false, so long as the false statements were not made knowingly or recklessly (see *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964)), or the matters were so within the teacher's presumed knowledge of school affairs that his statements would produce a harmful impact on the public. In reaching its determination, the court also made another significant observation:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here. (391 U. S., at 569-570)

Pickering is clearly distinguishable from the instant controversy. There, the letter confined itself to public issues and did not contain insulting and vituperative language, or an attack on the character of superiors. Unquestionably, as we have noted before, appellant had the right to speak out publicly on such matters of public interest as the policy of the Board of Education with respect to textbooks, the hiring practices with respect to black teachers and the lack of due process accorded to non-tenured teachers. We find, however, that appellant chose to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular. In doing so, she forfeited her claim to First Amendment protection. See *Duke* v. *North Texas State University*, 469 F. 2d 829 (5 Cir. 1972), *cert.* den. 412 U. S. 932 (1973).

Appendix A

We also reject appellant's argument that our affirmance of the determination of the Commissioner and the decision of the State Board of Education with respect to the charges made against her will serve to "chill" the association rights of teachers as well as the rights of teachers freely to speak and assemble. An aggressive, contentious and, perhaps, controversial teacher working within the structure of a school district as a faculty member and/or as an education association representative may confidently look to the First Amendment as a protective shield for his or her activities; however, an intemperate, venomous employee, be he or she a teacher or otherwise, cannot claim constitutional protection when he or she attacks his or her superiors in public in brawling terms for no purpose discernable other than to satisfy some personal need.

Our review of the entire record satisfies us that the findings of fact made by the hearing officer and adopted by the Commissioner of Education are supported by substantial evidence. We also find that the conclusion drawn by the Commissioner, based on the record and the hearing officer's report find substantial support in the record.

Appellant was suspended from her employment effective on September 8, 1971. On February 10, 1972, Chapter 435, Sec. 2 of the Laws of 1971 became effective. That statute, now embodied in N.J.S.A. 18A:6-14 provides that if the determination of charges pending against any employee of a board of education is not made by the Commissioner within 120 calendar days after certification of the charges, then such person shall be paid beginning on the 121st day until such determination is made.

The Commissioner determined that N.J.S.A. 18A:6-14, as amended, applied retroactively and ordered that ap-

pellant be paid her full salary from 121st day following her suspension until the date of his determination. The State Board of Education reversed in a five to four vote, concluding that the statute should not be given retroactive effect. We agree that the Commissioner's determination was correct and reverse the finding of the State Board in this respect. See the recent opinion of this court in *In The Matter of the Tenure Hearing of Paula M. Grossman, A/K/A Paul M. Grossman, School District of the Township of Bernards, Somerset County,* 127 N. J. Super. 13 (App. Div. 1974).

We affirm the decision of the State Board of Education, filed April 4, 1973, insofar as it affirms the decision of the Commissioner of Education of July 19, 1972, dismissing appellant from her employment with the Brick Township School System. The decision of the State Board insofar as it reverses the decision of the Commissioner to grant appellant compensation at her regular salary pursuant to the provisions of N.J.S.A. 18A: 6-14, as amended, and directing that appellant be paid at her full salary, in accordance with the statute, by the Brick Township Board of Education from a date commencing 121 days after her suspension until July 19, 1972, the date of the decision of the Commissioner of Education, is reversed.

APPENDIX

EXHIBIT "A"

PRESIDENT'S ADDRESS
ORIENTATION NEW STAFF

September 1, 1971

On behalf of the Brick Township Education Association I welcome you to the Brick Township School Dis-

trict. I look forward to your membership into the BTEA--for today more than ever we need the collective and organized strength of teachers in facing the many challenges here in Brick Township and indeed in the state of New Jersey.

At this point, I would like to divert for a moment to invite all of you to be guests of the BTEA Executive Board at a cocktail party—planned specifically for you —at the KNIGHTS OF COLUMBUS BUILDING . . . tomorrow . . . between 3 and 6 p.m. Our president-elect, Jim McCabe, will distribute directions at the end of this session. Please . . . attend.

As you are undoubtedly aware, we have had serious problems here in Brick this past year. Fortunately some have been resolved, regrettably others have not.

OUR PROLONGED and often bitter contract negotiations with the Brick Township Board of Education have resulted in a contract settlement. It is a contract governing many of your terms and conditions of employment. Within the coming weeks we shall have copies available for you. It is our full intention that the contract be fully honored by Board and administration alike.

OUR PROBLEMS as they relate to the negotiations of a contract have been resolved—at least until contract negotiations re-open 18 months from now—a word now about our resolved problems.

THE RECORD clearly shows that this Association has *no faith in the school's administration*—more specifically no faith in the superintendent of schools.

FORGIVE ME if the forum of the traditional Orientation Day would appear NOT to lend itself to a discussion of these matters. But what must be said will be said.

Appendix A

WHY DOES THIS Association not have faith in the Superintendent of Schools? Let me tell you a few stories.

1. Last year two fine young teachers with excellent records were recommended for rehiring by their principals and their supervisors. They were dynamic, well-liked, personable and extremely competent men. Without warning, without explanation, this man fired them. The lower courts have said that his action was legal but there is a higher court that would term the action despicable—the court of justice, reason and compassion.

2. ANOTHER STORY—earlier last year an English teacher made a speech at Atlantic City criticizing what has throughout the State become known as the "BRICK BOOK BURNING"; as a result this teacher was subjected to some of the most inhuman treatment ever perpetrated by a Board of Education, resulting in her suspension and the first strike in New Jersey on the issue of Academic Freedom. Through it all, the man that just spoke to you remained conspicously silent.

3. I WANT TO TELL YOU another story—a third story. There were two elections in Brick Township last year—one for Mayor and one for the Board of Education. Despite all good sense and good reason, this man became intimately embroiled in these political campaigns—destroying whatever distance and objectivity he might have been able to maintain as the so-called *chief teacher* in the district.

4. ANOTHER STORY—the year before last three books were arbitrarily yanked from the English curriculum—arbitrarily by the Board of Education. Books, incidentally, all written from the black point of view. This man not only remained silent throughout the controversary [sic],

he admits that the blame is his alone. In passing, perhaps you might ask him someday how many black teachers have been hired to work in Brick Township, and if they applied would they be seriously considered.

I could tell you stories about this man violating the confidence of the Grievance Procedure. I could tell you a story about him digging into a man's past to threaten his professional life—I could go on and on with story after story but I think you get the point. The man who just spoke to you fits Hamlet's description of his uncle . . . that he does smile and smile and smile and yet remain a villain.

Brick Township is a *snakepit* for young teachers and I would like to give you one bit of advice—for the next three years dig a professional hole and hide under it—don't budge, don't move, say "yes sir" to everyone and wait and watch and remember that in New Jersey there are very good tenure laws . . . your time will come. And our only defense has been and ever will be a strong professional association and I can only urge everyone of you to please, for your sake and for ours, become members of the united teaching profession. There are more teachers than there are superintendents.

The Record Shows that we will fight for the teachers, but until there is more enlightened courts, our fighting will affect no fire. We can't win . . . yet we will go to the ends of the world for you but probably fall off the edge for you because you can't be saved . . . So Hide.

If You Have Been reading the paper or attending Board meetings you know that I have been fighting against you—some of you—those of you not fully certificated . . . but you are here now, you are brand new teachers—most of you—and you are not aware that you

have become economic pawns. From my own personal experience, it takes a year or two to find yourself in this business. Two or three brand new teachers in a district can be absorbed . . . but not 70 or 80% of them, some of whom are not properly certificated. This hiring practice is eating at the core of the principle of certification, and I term this whole procedure a *callous economic* gesture.

But Now You Are Here—we're behind you . . . we will support you, but we want you to know our position. We're Being Honest. We believe now that you are here you will blend in with the rest of the staff. We'll Support You All The Way—

The BTEA Will Provide for the involvment of teachers in educational policy, will provide for due process for its non-tenured teachers, will promote the welfare and provide for the protection of all its members, Carmen Raciti not withstanding.

Please Join With Us In That Endeavor. Thank you

(Emphasis appellant's)

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—July 22, 1974)

SUPREME COURT OF NEW JERSEY

C-759 SEPTEMBER TERM 1973

KATHLEEN M. PIETRUNTI,

Respondent-Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP,

Petitioner-Respondent.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 22nd day of July, 1974.

FLORENCE R. PESKOE
Clerk

APPENDIX C

Decision of the Commissioner of Education

(Filed—July 19, 1972)

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN M. PIETRUNTI, SCHOOL DISTRICT OF THE TOWNSHIP OF BRICK, OCEAN COUNTY.

For the Board of Education, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the New Jersey School Boards Association and the New Jersey Association of School Administrators, *Amicus Curiae,* Thomas P. Cook, Esq.

Petitioner, the Township of Brick Board of Education, hereinafter "Board," has certified a total of twenty charges against respondent, a tenure teacher in its employ. These charges, in their totality, in the judgment of the Board, constitute insubordination or conduct unbecoming a professional employee of the school system. While not denying the factual correctness of many of the principal allegations contained in the Board's complaint, respondent avers that they provide no basis for censure, and that she merely exercised rights guaranteed to her by constitutional prescription.

Appendix C

A hearing in this matter, conducted by a hearing examiner appointed by the Commissioner, began on January 17, 1972, at the office of the Ocean County Superintendent of Schools, Toms River, and was continued on six other days over a period of three months, concluding finally on April 12, 1972. The delay in hearing completion was in part occasioned by the illness of a principal witness, the Superintendent of the Brick Township Schools.

Briefs were submitted on May 19, 1972, by the principal parties named herein and by *Amicus Curiae* on behalf of the New Jersey School Boards Association and the New Jersey Association of School Administrators. In an intermediate decision promulgated on February 17, 1972, the Commissioner denied the application of a group of Brick Township citizens to submit a brief as intervenors. A Motion to Dismiss the charges herein, brought by respondent at the conclusion of the Board's case, was held in abeyance, and a defense was required. A decision on a second Motion, directing the Board to compensate respondent beginning on the 121st day after her suspension from her teaching duties, pursuant to statutory mandate, N.J.S.A. 18A:6-14, was promulgated by the Commissioner on June 14, 1972. The report of the hearing examiner is as follows:

Respondent was employed as a business education teacher in Brick Township for a period of five years prior to her suspension by the Board on September 7, 1971. The immediate, motivating factor, which prompted the Board's determination *sub judice,* was a speech, which respondent had given at an orientation day meeting of teachers, new to the Brick Township School District, on September 1, 1971. Her speech on that occasion was

given on behalf of the Brick Township Education Association, which she was serving as President, and was critical of the Board and of the Superintendent of Schools, at whose invitation respondent appeared. This speech (P-1), which is reproduced in its entirety below, followed a lengthy period of difficult negotiations, which were evidently acrimonious and replete with recriminations on both sides:

> "On behalf of the Brick Township Education Association I welcome you to the Brick Township School District. I look forward to your membership into the BTEA—for today more than ever we need the collective and organized strength of teachers in facing the many challenges here in Brick Township and indeed in the state of New Jersey.
>
> "At this point I would like to divert for a moment to invite all of you to be guests of the BTEA Executive Board at a cocktail party—planned specifically for you—at the Knights of Columbus Building . . . tomorrow . . . between 3 and 6 p.m. Our president-elect, Jim McCabe, will distribute directions at the end of this session. Please . . . attend.
>
> "As you are undoubtedly aware, we have had serious problems here in Brick this past year. Fortunately some have been resolved, regrettably others have not.
>
> "Our prolonged and often bitter contract negotiations with the Brick Township Board of Education have resulted in a contract settlement. It is a contract governing many of your terms and conditions of employment. Within the coming weeks we shall have copies available for you. It is our full intention that the contract be fully honored by Board and administration alike.

Appendix C

"Our problems as they relate to the negotiations of a contract have been resolved—at least until contract negotiations re-open 18 months from now—a word now about our unresolved problems.

"The record clearly shows that this Association has *no faith in the school's administration*—more specifically no faith in the superintendent of schools.

"Forgive me if the forum of the traditional Orientation Day would appear not to lend itself to a discussion of these matters. But what must be said will be said.

"Why does this Association not have faith in the Superintendent of Schools? Let me tell you a few stories.

"1. Last year two fine young teachers with excellent records were recommended for rehiring by their principals & their supervisors. They were dynamic, well-liked, personable and extremely competent men. Without warning, without explanation this man fired them. The lower courts have said that his action was legal but there is a higher court that would term the action despicable—the court of justice, reason and compassion.

"2. Another story—earlier last year an English teacher made a speech at Atlantic City criticizing what has throughout the State become known as the 'Brick Book Burning,' as a result this teacher was subjected to some of the most inhuman treatment ever perpetrated by a Board of Education, resulting in her suspension and the first strike in New Jersey on the issue of Academic Freedom.

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Through it all, the man that just spoke to you remained conspicuously silent.

"3. I WANT TO TELL YOU another story—a third story. There were two elections in Brick Township last year—one for Mayor and one for the Board of Education. Despite all good sense & good reason, this man became intimately embroiled in these political campaigns—destroying whatever distance and objectivity he might have been able to maintain as the so-called *chief teacher* in the district.

"4. ANOTHER STORY—the year before last three books were arbitrarily yanked from the English curriculum—arbitrarily by the Board of Education. Books, incidentally, all written from the black point of view: This man not only remained silent throughout the controversy, he admits that the blame is his alone. In passing, perhaps you might ask him someday how many black teachers have been hired to work in Brick Township and if they applied would they be seriously considered.

"I could tell you stories about this man violating the confidence of the Grievance Procedures. I could tell you a story about him digging into a man's past to threaten his professional life—I could go on and on with story after story but I think you get the point. The man who just spoke to you fits Hamlet's description of his uncle . . . that he does smile and smile and smile and yet remain a villain.

"BRICK TOWNSHIP is a *snakepit* for young teachers and I would just give you one bit of advice—for

the next three years dig a professional hole and hide under it—don't budge, don't move, say 'yes, sir' to everyone and wait and watch and remember that in New Jersey there are very good tenure laws . . . your time will come. And our only defense has been and ever will be a strong professional association and I can only urge everyone of you to please, for your sake and for ours, become members of the united teaching profession. there are more teachers than there are superintendents.

"THE RECORD SHOWS that we will fight for the teachers, but until there is more enlightened legislation or more enlightened courts, our fighting will affect no fire. We can't win . . . yet we will go to the ends of the world for you but probably fall off the edge for you because you can't be saved . . . so hide.

"IF YOU HAVE BEEN reading the paper or attending Board meetings you know that I have been fighting against you—some of you—those of you not fully certificated . . . but you are here now, you are brand new teachers—most of you—and you are not aware that you have become economic pawns. From my own personal experience, it takes a year or two to find yourself in this business. Two or three brand new teachers in a district can be absorbed . . . but not 70 or 80% of them, some of whom are not properly certificated. This hiring practice is eating at the core of the principle of certification, and I term this whole procedure a *callous economic* gesture.

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"BUT NOW YOU ARE HERE—we're behind you . . . we will support you, but we want you to know our position. We're being honest. We believe now that you are here you will blend in with the rest of the staff. We'll support you all the way—

"THE BTEA WILL PROVIDE for the involvement of teachers in educational policy, will provide for due process for its non-tenured teachers, will promote the welfare and provide for the protection of all its members, *Carmen Raciti not withstanding.*

"PLEASE JOIN WITH US IN THAT ENDEAVOR. Thank you." (Emphasis respondent's)

While the fact of the speech itself is not in contention—respondent agrees that she gave it as reported, *supra*—the Board contends in substance, that respondent's allegations contained in the speech are either untrue or distortions of the true facts which should have been presented. The Board's contentions in this regard, all related directly to the speech, are contained in the first nine charges made against respondent, and were forwarded to the Commissioner on September 7, 1971. They are grouped below for reporting and discussion purposes as a cohesive entity under Roman number I. Subsequent to the filing of these nine charges, the Board certified eleven "supplemental charges" on October 11, 1971. The "supplemental charges" are not founded on the speech (P-1) and are, therefore, grouped for reporting and discussion purposes under Roman number II.

Appendix C

I.

CHARGE No. 1

"On September 1, 1971, Mrs. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association, as well as a tenure teacher employed by the Board of Education of the Township of Brick, was invited by the Superintendent of Schools, C. Stephen Raciti, to address the new staff at the orientation program. A copy of that address is annexed hereto and made a part hereof as Exhibit 'A.' (Further charges will be addressed to said speech subsequent to the within charge.) Said teacher on page 2, paragraph 1, accused the Superintendent of Schools, C. Stephen Raciti, of a 'despicable' action inasmuch as 'this man' fired certain non-tenure teachers, all of which was purportedly 'without warning' and 'without explanation.' Such an allegation directed toward the Superintendent of Schools, in light of the true facts, is conduct unbecoming a teacher and insubordination to the office of the Superintendent of Schools inasmuch as the men referred to by the teacher were not fired by the Superintendent, but the Board of Education merely failed to renew their contracts at the expiration of the non-tenure teachers' contracts. This matter was fully litigated and was the subject of a Final Judgment, copy of which is annexed hereto and made a part hereof as Exhibit 'B,' by virtue of which, such an allegation directed toward the office of the Superintendent of Schools is a perversion of fact which is subversive of the discipline and the morale of the school system."

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The Brick Township Superintendent of Schools, hereinafter "Superintendent," testified concerning the truth of this charge on January 18, 1972. He stated that the Board, by "unanimous" vote (Tr. II-236) had decided that the contracts of the two teachers of reference should not be renewed for school year 1971-72 after receipt of the Superintendent's recommendation to this effect. He also said that no reasons for the Board's decision in the matter were given to the teachers either before or after the Board's decision.

Respondent contends that there is no doubt concerning the factual allegation herein—the men were "fired" to use the verb of the vernacular—and that, in her judgment, such an action, taken without a statement of "reasons" for the action was "despicable."

It is of note here that proceedings on behalf of the two teachers, whose contracts were not renewed, were instituted in the Superior Court of New Jersey, Chancery Division, Ocean County, but that the relief requested, reinstatement, was denied. The Court found that the teachers had not exhausted their administrative remedies or availed themselves of grievance procedures, and that there was no proof of any violation of "constitutional right," (P-2) which justified the Court's intervention.

The hearing examiner believes it is stating the obvious to say, as the Board does, that the Superintendent did not "fire" the two men—non-tenure teachers—but that their contracts were simply not renewed by the Board. However, this appears to be the fact of the matter, in the absence of any proof that the teachers were dismissed prior to the time their contracts expired at the end of school year 1970-71. Such proof was not elicited at the hear-

ing. Therefore, the hearing examiner holds that there was no basis for respondent's statement that the two teachers were "fired," although this may be the common understanding of the practical effect of the Board's action on persons who may not be versed in the technical ramifications of school law.

CHARGE NO. 2

"Again, referring to the speech which is annexed hereto and made a part hereof as Exhibit 'A', the teacher has accused the Board of Education of perpetrating 'inhuman treatment' and as a result thereof has accused the office of the Superintendent of Schools as remaining conspicously (sic) silent with respect to the suspension of Rochelle Cassie, the English teacher referred to in paragraph 2, Page 2. Similarly, this misrepresentation at the meeting of the orientation of the new staff of the schools of the Township of Brick is a perversion of fact and distortion, which is subversive of discipline and morale of the entire school system. With respect to the true facts concerning this incident, the teacher in question was not suspended for a speech given in Atlantic City, but for a classroom delivery of said speech and was in fact suspended for the use of 'poor judgment' by her own admission, and which admission is contained in a letter from Rochelle Cassie dated November 17, 1970, a copy of which is annexed hereto and made a part hereof as Exhibit 'C'. As a result of this 'poor judgment,' the Board of Education did in fact pass a Resolution which is fully dispositive of this matter and

sets for the the true facts, a copy of which Resolution is annexed hereto and made a part hereof as Exhibit 'D'. All of which is conduct unbecoming a teacher."

There are certain facts with regard to this charge, which are not in dispute; namely, that:

1. The teacher, Mrs. Rochelle Cassie, was in fact suspended by the Board on November 13, 1970;
2. She did later admit that the reading of the speech mentioned, *supra*, in the charge, in class "* * * may have been poor professional judgment;
3. After this admittance, she was restored to a full teaching status on November 19, 1971, by a resolution of the Board adopted on or about November 18, 1971; and
4. The Superintendent did not take a public position in the matter.

In terms of this charge, there is only one real question of fact to determine, i.e. whether or not, as alleged by respondent in her speech of September 1, 1971 (P-1), *supra*, Rochelle Cassie was suspended from her teaching duties because "* * * she made a speech in Atlantic City * * *" or because, as the Board maintains, she read the same speech at a later date in class.

In testimony for the Board, the Superintendent said, in this regard: (Tr. II-258)

> "Q. All right; now, as to the reasons for the suspension of Rochelle Cassie * * * this speech that Miss Cassie gave, where and when was it given?

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"A. The original speech was given at the N.J.E.A. Convention of 1970, I think. * * *

"Q. Now is that the only time it was given?

"A. No; then it was later read to * * * at least two or three of her classes.

"Q. Now as you recall the reasons for suspension—?

"A. That was to the point exactly; the reading of a speech to her class which was unrelated to the curriculum. * * *"

On the other hand, respondent maintained (Tr. VII-1009) that she was familiar with the reason the Board of Education gave, but that she did not accept that reason.

The hearing examiner notes that the incident herein was one in which the teacher, Rochelle Cassie, maintained that she had been "misquoted" in a newspaper article to the point of distortion, and sought to correct the inaccurate impressions she thought the newspaper had created by "reading excerpts" from her speech in class. When apprised of Miss Cassie's version of the incident, and her feeling that the reading of the speech in class may have been poor professional judgment, (P-3) the Board promptly rescinded its previous suspension, and restored her to teaching duties.

The hearing examiner is left to wonder why the Board did not listen to Miss Cassie's explanation prior to her suspension, which it originally imposed, and why respondent left out of her speech of September 1, 1971, (P-1) any mention of the fact that the Board acted promptly to restore Miss Cassie to duty when apprised of her version of the incident in question. Only one fact emerges in clear

perspective from this charge—the incident involving Miss Cassie's suspension had long since been terminated, and its resurrection by respondent in September 1971, in connection with her speech of that date (P-1) was inappropriate, in the opinion of the hearing examiner, as any part of a charge against the Superintendent. It must be supposed, at this juncture, that the judgment the Board made with regard to Rochelle Cassie was based on the same newspaper material, which Miss Cassie later indicated was inaccurate, and a distortion of what she had said. There was no evidence that the Superintendent knew of arguments to the contrary, which would have supported, or should have been offered in support of, Miss Cassie's position.

Finally, while the hearing examiner "believes" that the Board acted, with respect to the incidents in Charge 2, for the reason it stated in its resolution (P-4), and not because Miss Cassie had criticized the Board at Atlantic City, he cannot find that respondent was incorrect or that her charges herein were a distortion of the truth without more detailed evidence than was presented at this hearing. Neither, for the same reason, can he find that respondent's allegation—that Miss Cassie was fired because of her speech in Atlantic City unsupported by any evidence—is true in fact.

Accordingly, the finding of the hearing examiner with respect to this charge is limited to the opinion reported, *supra*,—that the incident *sub judice* was inappropriately raised by respondent. There is no specific finding of fact with respect to the core of the charge *per se*—that Rochelle Cassie was suspended from her teaching duties for a reason other than the one that respondent recited in the speech of September 1, 1971. (P-1) Testimony from Board

members, subject to cross-examination, as to the motivation which impelled them to suspend Miss Cassie, was a necessary and requisite supplement to their published statement in this regard. Such testimony was not offered at the hearing, and what appears to be a precipitate act of suspension by the Board causes the hearing examiner some doubt as to the true motivation which impelled the Board to act as it did.

CHARGE NO. 3

"With respect to the charges made against the office of the Superintendent of Schools contained in paragraph 3, page 2, of Exhibit 'A', C. Stephen Raciti, Superintendent of Schools, denies that he was 'intimately embroiled' in political campaigns, but admits that his wife, as District Chairman, was hostess for a cocktail party for the Assistant Superintendent of Schools for his successful campaign for the Mayorship of the Township of Brick, and further admits that he attended a cocktail party given for Daniel F. Newman, a successful candidate for the last school district election for a seat on the Board of Education. However, such an allegation that such activity would 'destroy' the objectivity of the office of the Superintendent of Schools is a subjective conclusion and a flagrant attack on the office of the Superintendent of Schools, and an attempt to deny to the Superintendent freedom of political activity, freedom of speech and adequate freedom as an individual, thereby resulting in conduct perpetrated by the teacher as being subversive of the discipline and morale of the school system."

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The judgment involved with respect to the truth of this charge is whether or not the Superintendent was "intimately embroiled" in political campaigns—so enmeshed in them that his objectivity was destroyed—or whether his activity in this regard was only that which any citizen might exercise. The specific value judgment required is related to the word "intimately."

There is no doubt that the Superintendent was involved with political campaigns to some extent. The charge herein recites his own version of such involvement, and his testimony elaborates on the involvement of the recital. Specifically, he states that he:

1. had a "cocktail party" at his home for a mayoral candidate [a school administrator]. (Tr. 262)
2. attended a "cocktail party" given by one Board member "while he was running for the Board." (Tr. 262)

and that his wife had served as a block worker on one occasion. (Tr. 263) However, the Superintendent also said that he attended dinners sponsored by both major political parties, (Tr. 262) that he had not made financial contributions to the two campaigns with which he admitted some involvement (Tr. 264), and that he held no "political position or office." (Tr. 262)

Respondent's testimony offered no proof of additional political activity on the part of the Superintendent, but she maintains that the point of view she held, and expressed in her speech (P-1), that the Superintendent was "intimately embroiled in politics," was one which represented a legitimate point of view that she as a teacher could entertain and express.

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The hearing examiner notes that Webster Dictionary's pertinent definition of 'intimately," in the context of it use herein, is

> "• • • closely acquainted or associated; very familiar • • •"

and he opines that, judged by such a standard, the political activity of the Superintendent of Schools as reported, *supra*, could not be rightfully characterized as activity involving intimate embroilment, although there was clearly an involvement to a lesser degree. The hearing examiner leaves to the Commissioner's judgment the decision as to whether or not such involvement was deleterious to the Superintendent's role as an educational leader, or in any way proscribed, and whether respondent's inclusion of such allegations represented conduct unbecoming a teacher in the public schools.

CHARGE No. 4

> "The teacher, in the assertion set forth on pages 2 and 3, paragraph 4, has misrepresented facts at the orientation of the new staff, in denying to the Board of Education the sole right to determine the curriculum of the school district as set forth in Title 18A of the Statutes of the State of New Jersey, and in so doing has exhibited conduct unbecoming a teacher, and is subversive of the discipline and morale of the school district. The teacher, in continuing her flagrant attack on the Superintendent of Schools, assumes the prerogative to interpret the alleged silence of the Superintendent of Schools concerning the legal action taken by the Board of Education of the Township of Brick. Again, in conduct

unbecoming a teacher and resulting in being subversive of discipline and morale of the school district, the teacher has by innuendo raised the question of the lack of black teachers hired in the school district of the Township of Brick, when in fact to the best of the Superintendent's knowledge, information and belief there have been no black applicants for positions in the school system in the calendar year. Again, in a flagrant attack on the Superintendent of Schools by half statements and innuendoes without factual substantiation thereof, and in derogation of the office of the Superintendent of Schools, the teacher has alleged a violation of a 'confidence of the Grievance Procedure', for which no action is pending for breach of contract, if the same were in fact believed to be true."

This charge against respondent, although obliquely stated in the opinion of the hearing examiner, is that:

1. Respondent is attempting to usurp an authority granted to the Board to determine curriculum when she charges in her speech (P-1) that the Board "arbitrarily yanked" books from the English curriculum. (In the Board's view, the responsibility to determine curriculum context—including materials—is one it must exercise, and a charge that it performed this duty was an insubstantial base for a charge by respondent.)
2. Respondent raised a charge by innuendo, i.e. no black teachers have been hired in Brick Township; therefore, the Board must have a discriminatory hiring policy.
3. Respondent violated confidences.

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Thus, the charge is seen to have three component parts derived from Paragraph Four of respondent's speech.

These sub-charges and findings pertinent thereto are discussed below:

1. The hearing examiner believes that it is conjecture on the Board's part to state, as part of the charge herein, that respondent, by criticizing the Board's action in removing certain books from the library, is "denying to the Board of Education the sole right to determine the curriculum of the school district." The hearing examiner can find no denial, or usurpation, in such criticism by respondent, and to this degree, he finds the subcharge without merit. The only question for the Commissioner's determination is whether such criticism was appropriate to the time and place of its expression.

2. The Superintendent of Schools admits that no black teachers have been employed to work in Brick Township, but denies that this fact implies that a policy based on racial discrimination exists. Specifically, he testified (Tr. II-72, 73) that there had been a dearth of black applicants for positions in the Township Schools, and that the one black candidate he had interviewed was not employed because a local candidate was properly certified and was given preference. However, the Superintendent also testified that the decision-making process relative to all such job candidates involved staff members other than himself (i.e. subject supervisors, principals, assistant superintendents). This fact was confirmed by the testimony of the assistant superintendent of schools, who evidently serves as the district's principal interviewer of new teaching candidates, and who also testified that black candidates would be "seriously considered" if they appeared for interview and were qualified. (Tr. I-94)

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Respondent observes that she is charged herein with raising a question; namely, whether or not black teachers, if they applied for teaching positions, would be "seriously considered," and maintains that such a question can hardly be the basis of a charge against her.

The hearing examiner notes that this sub-charge is based on one sentence of the fourth numbered paragraph of respondent's speech (P-1)—and that all of these four paragraphs relate back directly to the phase of the speech, which states, *inter alia,* that the "Association" has "no faith in the superintendent of schools." To the extent that the question *sub judice,* which respondent posed in her speech, (P-1) is considered an infererence against the Superintendent of Schools, it would appear to be a distortion of the facts as reported, *supra,* since it is clear that the Superintendent is not solely responsible in Brick Township for the recommendations, which lead to employment of teaching staff members, and it is equally clear that he does not employ them—the Board does by statutory mandate. While the fact of the Board's not employing black teachers might seem to indicate a case of racial discrimination, no evidence was presented at the hearing which confirms even an inferred premise to this effect as true in fact.

3. The Superintendent could not recall any instances wherein he had violated the confidence of the grievance procedure (Tr. 274). Later, on rebuttal, he denied he had ever "threatened" the professional life of anyone. (Tr. VII-1120 *et seq.*) He also stated that such a charge against him personally had never been filed as a grievance pursuant to the grievance procedure. (Tr. VII-1124)

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The Superintendent's testimony on rebuttal was in response to direct testimony of two teachers, who offered the opinion that they had indeed been threatened by something the Superintendent had said or done. (Tr. V-767, 780)

The hearing examiner notes that counsel for the Board moved to strike the testimony of witnesses, who appeared in respondent's behalf and offered testimony against the Superintendent, on the grounds that such testimony was not relevant to any charge the Board had made. (Tr. V-767) At this juncture, however, it would appear to have some relevance to respondent's statement, contained in her speech, that she knew a "story" about the Superintendent "* * * digging into a man's past to threaten his professional life. * * *" Those who testified against the Superintendent evidently believed his actions had constituted a threat, and in this respect, at least, there was some basis for the "story," which respondent never told, but which she said she "could tell."

However, by this finding, the hearing examiner does not imply a parallel finding that the charges made against the Superintendent were, indeed, true in fact. The Board correctly notes that they were never made the subject of a formal grievance, and the inference is clear that the alleged "threats" were evidently never viewed with much alarm prior to the time they were characterized as such herein.

The only question posed for the Commissioner's determination with respect to this sub-charge (3) is whether the pertinent part of respondent's speech considered herein was factually based in truth or in her belief and, if it was, whether or not the Orientation Day ceremony was a proper forum for its expression.

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CHARGE No. 5

"The teacher, in a reckless attack upon the person of the Superintendent of Schools, by way of character assassination, has represented in said speech, as set forth on page 3, at the orientation of the new staff held on September 1, 1971, that the Superintendent, 'the man who just spoke to you fits Hamlet's description of his uncle . . . that he does smile and smile and smile, and yet remain a villain.' As a teacher in the school district and as a teacher who represents herself to be knowledgable in the field of Shakespearean literature, such an accusation against the Superintendent of Schools is subversive of the discipline and morale of the school system and such misrepresentation to the new staff inasmuch as Hamlet's uncle, King Claudiuss, in the eyes of Hamlet, was a 'villain' by virtue of the fact that Hamlet did in fact believe that his uncle had murdered his father and was guilty of incest and adultery. Such an igorant accusation and classification of being a 'villain' in this Shakespearean context seriously questions the fitness and value judgment of this teacher as well as being conduct unbecoming a teacher."

The hearing examiner notes that respondent's quotation from Hamlet contained in her speech (P-1) was read into the record by the Board in context with sections from the play which preceded it (Tr. II-282), and that the instant charge is based on an assumption and an inference; namely, that respondent knew the context from which the portion she used was drawn and that the word "villain," which appears in that portion has a broad connotation. The con-

notation is that by comparing the Superintendent to the "villain" of Hamlet, respondent was in parallel fashion clothing the Superintendent with that villain's garb—as a murderer etc.

The hearing examiner believes, however, that the assumption and the inference are unwarranted. Respondent denies them and proofs that might counter the denial are nowhere present. Accordingly, the hearing examiner recommends that consideration of this charge be founded on the words contained in the speech alone—that the Superintendent does "* * * smile and smile and yet (does) remain a villain."

CHARGE NO. 6

> "The teacher has classified the education system of the Township of Brick as being a 'snakepit' for young teachers and such a classification of her own educational system is subversive of the discipline and morale of the school system and seriously questions her fitness to teach and to make bona fide valued judgments."

The hearing examiner notes that the Superintendent alone testified concerning this charge and said he "did not" concur with the characterization of Brick Township as a "snakepit for young teachers." (Tr. II-286) The hearing examiner sees no need for further discussion of the charge *per se*—the characterization was admittedly attributed to respondent, and its propriety, as a part of the totality of the speech (P-1), is a matter for the Commissioner to judge.

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CHARGE No. 7

"The teacher, in her capacity as President of Brick Township Education Association and as a tenure teacher in the teaching district, in her address to the orientation of the new staff on September 1, 1971, again exercised lack of serious value judgments in suggesting to the new staff a code of conduct for said new staff which seriously impairs, perverts and subverts the discipline and morale of the school system by utilization of the Teachers' Tenure Act as a means for the lack of advancement of professional conduct to the end of merely gaining tenure."

This charge, like Charge 6, requires not a finding of fact but a value judgment by the Commissioner. Respondent admittedly said: (P-1)

"* * * for the next three years dig a professional hole and hide under it—don't budge, don't move, say 'yes sir' to everyone and wait and watch and remember that in New Jersey there are very good tenure laws . . . your time will come. * * *"

The Board's legal argument is contained in the charge and receives elaboration, by reference to respondent's personnel file (R-5), in the Brief of counsel.

Respondent did not testify concerning this charge.

CHARGE No. 8

"The teacher has seriously interfered with the administration of the school system by classifying

> hiring practice of the administration as a 'callous economic gesture' and by such allegation to the new staff, who are a product of this alleged callous economic gesture, again exhibits lack of value judgment and exhibits philosophy that seriously question her fitness, and are, in fact, subversive of the discipline and morale of the school system."

This charge states that respondent has "seriously interfered with the administration of the school system", but there was little factual support for this allegation at the hearing. The Superintendent did say that, with reference to respondent's speech (P-1), "some of the teachers had approached him" and felt "quite upset" about it. (Tr. III —513) He also stated that he had recently spoken to his principals, and two of them—he was unsure of which two —had indicated that teachers were "still upset." (Tr. III—515) However, there was no concrete evidence of any kind that the speech (P-1) ever served as an "interference" *per se* to the school administration, or that new teachers resigned their position because of it.

CHARGE NO. 9

> "The teacher in her speech (and particular attention is drawn to page 4 of the speech addressed to the new staff on September 1, 1971) again exhibits questionable fitness with respect to the fact that her primary obligation should be that of an educator. She presents mistruths; misrepresentations; and, perversions of fact as set forth in the charges hereinabove referred to, to elicit involvement of teachers to 'promote the welfare and pro-

vide for the protection of all its members' as a result of which her fitness is seriously questioned inasmuch as there is a failure to recognize the prime *raison d'etre* as a teacher is in the best interest of the children, and nowhere in her speech does she seriously address herself to that most important endeavor."

This charge is one, in reality, of summation—a legal argument that respondent's alleged "mistruths, misrepresentations and perversions of fact" should be sufficient reason for her dismissal. However, the charge lacks specificity, subject to proof. No proof was offered, and no defense was required by the hearing examiner with respect to this specific charge.

II.

The sub-charges contained within Charge 10 below are discussed separately under their designated letters, "A" through "I":

CHARGE No. 10

"Prior to September 1, 1971, Mrs. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association, as well as a tenure teacher employed by the Board of Education of the Township of Brick, by letters speeches and new (sic) releases displayed with respect to her attitude, conduct and counselling of the membership of her Association, conduct unbecoming a teacher by virtue of insubordination in fomenting disrespect to the

office of the Superintendent of Schools and to the Board of Education, and the usurpation of an administrative function, all of which questions her value judgment, and by such conduct is subversive of the discipline and morale of the school district, and seriously questions her fitness to teach:

SUB-CHARGE 10 (A)

"By a letter dated April 30, 1971, a copy of which letter is annexed hereto and made a part of hereof as Exhibit 'A,' Mrs. Kathleen M. Pietrunti submitted a directive concerning 'Letters of Intent', a portion of which letter exhibited the philosophy, 'however, I would urge all tenure teachers in the district NOT TO SIGN THIS LETTER OR COMPLY WITH *any request* (emphasis added by writer) THAT WILL MAKE THE BOARD'S JOB (referring to the Board of Education of the Township of Brick) ANY EASIER.'"

It was the testimony of the Superintendent of Schools that it was customary each spring to ask staff members to relate their intentions concerning the fall semester and to state whether or not they would return to their employment in the coming term. Accordingly, the Superintendent planned to circulate the same questionnaire in May 1971.

However, on April 30, 1971, respondent, as President of the Teachers' Association, addressed the following letter (P-5) to all staff members:

"It has come to my attention that the Board of Education shortly intends to issue 'Letters of Intent' to members of the faculty, at which time we will be asked to indicate whether or not we wish to be em-

ployed next year in the district. I would advise non-tenure teachers to comply completely and immediately with this request, since there is no need for them to jeopardize their position.

"However, I would urge all tenure teachers in the district NOT TO SIGN THIS LETTER OR COMPLY WITH ANY REQUEST THAT WILL MAKE THE BOARD'S JOB ANY EASIER.

"The reason for this is simple. Under the law they must rehire you next year, and your only obligation is to give them 60 days notice if you intend to leave the district. As I see it, the purpose of these letters will be to help the Board determine who is or is not returning in September—thereby aiding them in their hiring policies.

"I would just like to remind you that the history of negotiations this year has been one of constant stalling on the part of the Board in short, they have gotten themselves into this predicament, it hardly stands to reason that we should help them get out of it.

"Should these letters appear, the leadership will analyze the situation and inform you as to what they would like you to do. In the meantime, this might be our first opportunity to stand firm. Let us show the Board that BTEA is united in their determination to have meaningful negotiations in this district. Furthermore, should these letters come out and any of you meet with any form of coercion LET ME KNOW IMMEDIATELY. I assure you the coercion will not continue."

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Respondent testified that she wrote this letter (P-5) because (Tr. VI—936):

> "* * * the Board of Education, for some eighty-three days, had refused to even sit down to negotiate an agreement * * *."

and because (Tr. VI—936):

> "I felt it incumbent upon me to advise the membership * * * of their legal rights. * * *"

She further stated that she had been told that "most of the members ignored my communication; and that no one had criticized her for sending it at the time." (Tr. VI—937)

SUB-CHARGE 10 (B)

> "Illustrative of the intermeddling by Mrs. Kathleen M. Pietrunti in administrative affairs of the school district which are no concern of hers, either as President of the Brick Township Education Association, or as a tenure teacher, is a letter written to Mr. William Bell, President of the Board of Education, dated May 7, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'B'."

The letter (P-25) referred to herein is the sole proof, with respect to this sub-charge, that respondent was guilty of "intermeddling" in "administrative affairs." It is quoted below in its entirety for examination by the Commissioner in the context of the charge:

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"It is with grave concern that I watch the approach of the end of the school year with no indication that the Board has yet chosen to fill the administrative vacancies created by the September opening of two new schools. If, indeed there is meaning in the phrase 'Education—Our Mutual Concern', I can not see how the Board of Education, in good faith, could have allowed the postponement of these appointments.

"Certainly it is no secret that there would be a need for these administrators, and the Board has permitted the situation to arise which may cause serious setback to educational progress in the district. The opening of a new school is a major undertaking, and it would seem an unconscionable decision to allow the appointments to lapse for so long. It is not in the best interest of any of the candidates to keep them waiting; nor is it in the best interests of the district to keep these eventual appointees away from their school any longer.

"The seemingly interminable delay has long been a concern of mine as an educator, since the rationale behind it escapes me. As President of the Association, I feel that it is now my duty to request an explanation for the failure to make these administrative appointments, since I represent—in all likelihood—most of those who made application. And I feel it is within the jurisdiction of the President to seek an answer to their questions concerning the delay.

"I would earnestly request that either a member of the Board or the Superintendent of Schools for-

ward a pertinent explanation to me as rapidly as possible, so that when I am asked to make public comment regarding the inevitable appointments I may speak not from ignorance—but from fact."

SUB-CHARGE 10 (C)

"Again illustrative of the intermeddling of Mrs. Kathleen M. Pietrunti in her capacity as President of the Brick Township Education Association and as a tenure teacher employed by the Board of Education of Brick Township is a letter dated May 10, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'C' and 'C-1' and demonstrative of interfering in the administrative rights and prerogatives of the Superintendent of Schools by her presumption to redraft a letter of intent negating the one prepared by the Superintendent of Schools."

This sub-charge is related to sub-charge (A), *ante*, and concerns the letter of intent referred to, *supra*. As evidential material offered in support of a charge that respondent intermeddled in school affairs, it is reprinted in its entirety below: (P-6)

"In place of the letter of intent which you will be asked by the Board of Education to sign, please return instead the attached letter which the Association leadership feels should be a more appropriate statement of your intentions. We urge ALL TENURE TEACHERS to co-operate, thereby demonstrating from the onset that we are united in our determination to negotiate a decent salary agreement.

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"In light of the realities of the situation, as well as the nature of the present Board and Administration, we would advise that ALL NON-TENURE TEACHERS co-operate with the Board's request. Failure to do so would only jeopardize their position in the district, and it is not our intention to endanger the positions of those of you who—under the Statutes of New Jersey—*have no rights.*" (Emphasis respondent's.)

The letter of intent (P-6B), which the Board had requested teachers to sign, reads as follows:

"In lieu of a standard notification of employment next year, I would like to take this opportunity to state that I will accept employment in the Brick Township School District for the year 1971-1972 at the salary guide and terms and conditions of employment that the teachers Association and the Board of Education agree to in negotiations process.

"I assume, of course, that I will be placed on the appropriate level on this guide."

SUB-CHARGE 10(D)

"On May 11, 1971 Mrs. Kathleen M. Pietrunti directed a bulletin to all members of the Intermediate School concerning the failure of the Board of Education to renew the contract of non-tenure teacher, Jack Hickman, in which she purported to quote as well as demean the Superintendent of Schools by referring to him as 'our beloved Superintendent',

the sincerity of which is highly doubted, and attributed to him the following quotation 'with the labor market the way it is now we can afford to hire teachers with the *right image'*, a copy of which bulletin is annexed hereto and made a part hereof as Exhibit 'D'." (Emphasis the Board's.)

The bulletin referred to, *supra*, was labeled in evidence as P-7, and is quoted in its entirely below:

"Jack Hickman was fired Monday afternoon. Jack Hickman who has never received a bad evaluation. Jack Hickman who had the courage as a non-tenure teacher to speak out in favor of the strike. Jack Hickman with a wife and three children—Jack Hickman was fired Monday because, in the words of our beloved Superintendent 'with the labor market the way it is now we can afford to hire teachers with the right image'.

"As President of your Association, I say that this (sic) nothing short of pure administrative brutality. What does Carmen Raciti care if he throws an excellent teacher out on to the streets so long as he can have his revenge on both a teacher with a board as well as the all too popular Phil Pagano.

"Jack Hickman was set up and Jack Hickman's life has now been destroyed. The answer is up to you. Because of my heavy committments (sic) this week, I can not meet with you but I promise you the support of the Association leadership in doing anything to help Jack Hickman.

"Viewed in the light of the present cancer we call our Administration, Jack Hickman is probably a

terminal case, but there is no reason he should die in this district without some show that we care.

"I call on you people in the Intermediate School, people who have known Jack Hickman, to do something. Make a move, make it strong, and make it effective—and I promise you the support of all those who care.

"Yesterday I met with Mr. Raciti—along with Jim McCabe—and he must have said a half dozen times; 'trust me, trust me'. Then he called in Jack Hickman and bored the knife into his back. So much for the trust of C. Stephen Raciti—upon whose shoulders this infamy must lie. (*Emphasis respondent's.*)

"Please do something. We're with you—but do it now."

Testimony on this charge by the Superintendent was that he did not say, as respondent alleged, in P-7, *supra,* that "we can hire teachers with the right image," (Tr. III-592) but respondent maintains that the quote was relayed to her by Jack Hickman (Tr. VI-943) "* * * shortly after Mr. Raciti [Superintendent] cited that to him that day." This was admittedly hearsay evidence, (Tr. VI-944) and Mr. Jack Hickman did not testify directly to refute the Superintendent's denial.

Respondent also testified with respect to the reasons why she used the phrase "our beloved superintendent." She said (Tr. VI-944) in this regard:

"* * * Mr. Raciti, for a time, was, in my mind, too, a beloved superintendent; a superintendent who had received premature tenure; a superintendent whose

staff had stood up and applauded him when that privilege was afforded him. * * *"

SUB-CHARGE 10(E)

"Again illustrative of the insubordination to the office of the Superintendent of Schools and reckless accusations against C. Stephen Raciti, Superintendent of Schools, Mrs. Kathleen M. Pietrunti's letter dated May 14, 1971, referred to the administrative post of the office of Superintendent of Schools in paragraph 2 of said bulletin, a copy of which is annexed hereto and made a part hereof as Exhibit 'E', as 'an arbitrary and mindless dictatorship', and again is illustrative of the interference by Mrs. Kathleen M. Pietrunti in administrative decisions concerning the Board of Education and the administrators in the school district."

The bulletin referred to herein was admitted in evidence as P-8, and two paragraphs of that bulletin, in which the phrase *sub judice* appears, are quoted as follows:

"* * * Last night over 300 members of the Association met—with only one days notice—at Sea Girt Inn, and overwhelmingly voted to launch an all-out effort to save Jack Hickman.

"In a less important turn of events, they were just as strong in making a NO CONFIDENCE VOTE IN OUR SUPERINTENDENT. By doing this, they only formalized a feeling which had been sweeping through the district anyway. In effect, the teachers of Brick Township are united in their desire to end, what I feel, had been the beginnings of an arbitrary and mindless dictatorship. But the important task now

> is to find the means to save Jack Hickman—because we can not allow a superb teacher and dedicated family man to be destroyed because of one man's whimsy. We have many avenues open to us but our immediate need is for money. This time we will not play into the Board's hands and strike, instead teachers are pledging a days (sic) pay. * * *"

The Board argues that the use of the phrase "arbitrary and mindless dictatorship" is, once again, "name calling," since respondent did not know the reasons why the teacher, Jack Hickman, was not rehired, and could not properly label the decision as "arbitrary" in view of that fact. It observes that a court suit to restore the teacher had failed and that other legal avenues were available to him and were not pursued.

Respondent argues that her use of the phrase was proper, and that a denial of her right to use it would represent an interference with fair comment and free speech.

SUB-CHARGE 10(F)

> "Again illustrative of the insubordination as contained in the bulletin dated May 17, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'F', Mrs. Kathleen M. Pietrunti attended a meeting at the office of the Superintendent of Schools, and in accordance with her own shorthand notes commented of the Superintendent of Schools 'this man is more to be pitied than to be scorned'."

The bulletin referred to herein is marked as P-9 in evidence, and purportedly contains a word by word recital of a meeting on May 14, 1971, in the Superintendent's office,

which was attended by a teacher whose contract was not renewed, by the assistant superintendent of schools and by the Superintendent and respondent. In the course of the meeting, the Superintendent allegedly told one of the teachers that his contract would not be renewed for the coming year, and respondent then admittedly voiced the phrase attributed to her herein. However, in her view, the phrase can hardly constitute an act of insubordination, since it would apparently imply that the Superintendent should be viewed with less antipathy than with more.

The Board views the phrase as part of a total attitude, and maintains that a careful reading of all of respondent's words reveals more scorn than pity.

Sub-Charge 10(G)

> "Again illustrative of the insubordination of Mrs. Kathleen M. Pietrunti is a letter directed to all parents in Brick Town dated May 18, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'G', in which Mrs. Kathleen M. Pietrunti scathingly denounced the Superintendent of Schools for legally conducting his office of Superintendent of Schools, and thereby attempts to incite the parents to be critical of this legal action and accuses the Superintendent of Schools of devious conduct in so conducting his office."

The heart of the charge herein is basically that respondent "scathingly denounced" the Superintendent in a letter to all parents in Brick Township dated May 18, 1971. This letter (P-10) is reported in its entirety below:

> "What is happening to teachers in Brick Township stopped happening to other labor groups in the

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United States over 100 years ago. Only in teaching may a man who has served well for two or three years—a man whose immediate supervisors have praised him *in writing,* and and who has been recommended for another contract—only in teaching may this man be fired at the whim of an executive.

"The teachers are John Hickman and Ron Heinzman; the executive is C. Stephen Raciti, Superintendent of Schools. Despite the fine record of these two men—despite the support given to them by their building principals—Mr. Raciti choose to play God with their lives. We have asked the superintendent to tell us why; Mr. Raciti refuses to give us a reason. We think we deserve more than this from a man being paid $27,000 to bring quality education and harmony into our town.

"There is a *possibility* that LEGALLY the superintendent has the right to take this action; but the time has come for this man to stop hiding behind the law. If DECENCY, COMPASSION, and FAIRNESS still have meaning in our society, we have the duty to demand a show of humanity from those charged with managing our school district.

"So we come to you with our plea. Help have the professional lives of these two fine teachers by expressing your displeasure directly to the Superintendent and Board of Education. Write letters, make phone calls, ask questions—find out why these men who have been doing a fine job in teaching your children will soon be out of work. You are the taxpayers of this town, and you have the right to seek the answers that have been denied us.

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> "So we ask you to share our sorrow, and our anger; we ask you to force an answer to this break-down of humanity in high places; we ask you to act both in our behalf; and on the behalf of your children." (*Emphasis respondent's.*)

In the Board's view, the letter (P-10, *supra*) was an incitement of parents to "write letters, make phone calls, ask questions," and was not, as respondent maintains, an attempt to apprise parents of what was happening within the school system. The Board also maintains that it was a false representation to say, as respondent did, that teachers were refused reemployment because of the "whim of an executive."

Respondent maintains that she had a constitutional right to say what she did herein, and that the charge is an attempt to throttle the free speech guarantee, which is afforded to all citizens by the U.S. Constitution. She denies she was attempting, in the letter, to incite some kind of a movement against the Superintendent. (Tr. VI—950)

SUB-CHARGE 10 (H)

> "As President of the Brick Township Education Association, Mrs. Kathleen M. Pietrunti either incited, organized or condoned telephone calls being made to parents of students to have them attend a rally for John Hickman and Ronald Heinzman at the Lake Riveria Club House on or about May 14, 1971, and which conduct on behalf of her Association members was objected to, and did in fact occasion one parent to write a letter to the Principal Bart H. Brooks, a copy of which is annexed hereto as Exhibit 'G-1'."

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On the face of it, the hearing examiner holds that this charge is faulty, that there was no testimony in support of it, and that it was dismissed by the hearing examiner with no defense required, at the conclusion of the Board's case.

SUB-CHARGE 10 (I)

> "Mrs. Kathleen M. Pietrunti, as President of the Brick Townhip Education Association, again exhibited conduct unbecoming a teacher and usurpation of administrative functions, and a breach of contract between the Board of Education of the Township of Brick and the Brick Township Education Association in unilaterally issuing a directive, a copy of which is annexed hereto and made a part hereof as Exhibit 'H', dated June 7, 1971, concerning collection of moneys, and which directive was refuted by Principal Bart H. Brooks, when in fact any such grievance concerning the collection of moneys should have followed the proper grievance channels as referred to above, all of which is conduct unbecoming a teacher and questions her fitness to make value judgment, and is subversive of the discipline and morale of the school system."

The so-called "directive" sent to all teachers by respondent on June 7, 1971, (P-11) which is referred to, *ante*, reads in its entirety as follows:

> "As most of you know, ARTICLE X, Section A (2) of the Comprehensive Agreement provides that teachers shall not be required to collect or handle money. Therefore, I would remind you that you are not required to collect book fines despite the page included in the close-out report.

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"I brought this to Mr. Brooks' attention and he agrees. He told me that: if teachers do not wish to handle the money they should send it to the office where it will be handled by the secretary.

"I would like to take this opportunity to thank Mr. Brooks for his understanding of the contract. And in closing, I would say each teacher should follow whatever procedure suits his own needs."

However, on direct examination, the Principal of the school, who is mentioned in the text of the "directive" denied he had agreed that teachers were not required to collect the money, which was the subject of the dispute. He also said (Tr. IV—201) that shortly thereafter, he published a bulletin which contained, *inter alia,* the words:

"* * * the directive to teachers to collect moneys still stands * * *."

The question posed for the Commissioner's judgment is whether or not this activity of respondent represented an encroachment on, or a usurpation of, authority granted to school administrators to administer their schools.

CHARGE No. 11

"Mr. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association and as a tenure teacher under suspension, did in fact release to the news media a news release, a copy of which is annexed hereto and made a part hereof as Exhibit 'I', wherein she purports to misrepresent to the news media and to the public at large a legal determination by the Board of Educa-

tion, which in fact the Board of Education did not so determine, and which in fact the Board of Education at the time of the filing of the within charge has no intention to submit to binding arbitration."

There was no evidence presented with reference to this charge, and it was withdrawn by the Board. (Tr. V—650)

CHARGE No. 12

"On August 10, 1971, Mrs. Kathleen M. Pietrunti directed a letter to Mr. William Bell, President of the Board of Education, sending carbon copies to C. Stephen Raciti, as noted thereon, as Superintendent of Schools, and Joseph Jardot, a copy of which is annexed hereto and made a part hereof as Exhibit 'J', which again illustrates the insubordination of Mrs. Kathleen M. Pietrunti, the misrepresentation of the true facts as they occurred, all of which is an attempt to usurp administrative functions, is conduct unbecoming a teacher and is subversive of the discipline and morale of the school system. The actual facts as they all occurred are set forth in a letter directed by Donald H. Ward, Esquire, attorney for the Board of Education, a copy of which is annexed hereto and made a part hereof as Exhibit 'K'."

The letter of August 10, 1971, from respondent to Mr. Williaim Bell, President of the Board, admitted into evidence as P-12, contains the following two opening paragraphs which, in the Board's judgment, represents an attempt by respondent to usurp "administrative functions," and is an example of "conduct unbecoming a teacher":

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"If the recent movement towards harmony and pride in the Brick Township Education system has any meaning at all, both sides, Association and Board, must scrupuously adhere to the provisions of the contract. This does not mean a lot of nits and lice or undue formality, but the only thing that binds us together is the master agreement.

"What has generated these remarks is an uncomfortable incident which occurred recently when Mr. James McCabe and I conferred with the superintendent regarding the grievance of Miss Carol Collett. We had already passed the superintendent's level as described in ARTICLE II, Section C of the contract, yet we were flexible enough to accede to his request that we return for consultation, since it was his feeling that the matter could be resolved without going before the Board. At this point we did not rigidly adhere to the contract but felt that it, and Miss Collett, could best be served by this meeting. Unfortunately, whatever movement towards a settlement of this rather sticky grievance was almost destroyed by the rather sudden and unexpected intrusion of Mr. William Bell, who insisted that he be permitted to become party to the conference. We view this, in retrospect, as an intrusion into the sphere of the Superintendent's influence and only served to ruin whatever good work Mr. Raciti had done up to the point of Mr. Bell's entrance. * * *"

The letter, *supra*, was answered by the Board's solicitor in a letter dated August 17, 1971. (P-13) This letter

disputes respondent's contention that Mr. Bell had intruded on the meeting of reference and states in part:

> "This is to acknowledge receipt of your letter of August 10, 1971. I have been specifically directed by President William Bell to reply to you inasmuch as the contents of the letter were factually directed toward him.
>
> "I would like to point out to you that Mr. Bell did not intrude at the meeting at the Superintendent's office. He went there on another matter, and at your express invitation and consent was involved in the matter concerning Miss Collett. As to the reasons for this consent and express invitation, the answer lies solely within your subjective thinking. President Bell did not insist that he become a party to the conference, but was an express invitee, and participated in the conference in an aura of informality. • • •"

Neither Mr. Bell, nor respondent, testified concerning this charge, but the Superintendent said (Tr. III—442) that he though Mr. Bell had entered the meeting of reference "as an observer," that he was not "disruptive," and that he was not asked to leave by anyone present.

The question of fact is whether the Board President "intruded" on a meeting where his presence was neither necessary nor wanted and where he was uninvited. In this regard the hearing examiner observes that P-13 maintains that the President was an "express invitee" to the meeting in question, but the Superintendent stated in his testimony that he had not issued such an invitation. (Tr. III—442) There was no testimony that an invitation was issued by anyone else, as P-13 alleges.

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From these facts, the hearing examiner makes a deduction; namely, that the Board President knew of the meeting, attended it as an observer and was not an "invitee," as P-13 avers. Since the dictionary lists as one meaning of intrude, "* * * to enter without invitation * * *," the hearing examiner believes that, in this one sense, the Board President was an "intruder," as respondent stated in her letter. (P-12) However, there is no evidence that such intrusion was the subject of complaint by respondent at the time, and, in effect, Mr. Bell stayed in the meeting by a kind of passive acquiescence.

The hearing examiner fails to see a misrepresentation of facts herein, or evidence of conduct unbecoming a teacher, which was "subversive of the discipline or morale of the school system." While one may question respondent's judgment in raising the issue of Mr. Bell's presence at the meeting *sub judice* at a later date, since there was no evidence that it harmed the meeting and the matter for which the meeting was called was "resolved," the hearing examiner finds little merit in the charge *per se*, and recommends that it be dismissed by the Commissioner.

CHARGE NO. 13

> "Illustrative of the insurbordination and vindictive nature of Mrs. Kathleen M. Pietrunti, all of which questions her fitness as a teacher, and is subversive of the discipline and morale of the school system, is a letter from Mrs. Kathleen M. Pietrunti dated August 27, 1971, directed to Mr. C. Stephen Raciti, Superintendent of Schools, a copy of which is annexed hereto and made a part hereof as Exhibit

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'L'. The meeting was requested, not by Mrs. Kathleen M. Pietrunti, but by the New Jersey Education Association through Mr. Messner, in which Mr. Messner was advised that the Board of Education did not have to hold a hearing under the contract between the Board of Education of the Township of Brick and the Brick Township Education Association inasmuch as the Board had already reached its determination within the thirty (30) day time period set by said contract, and inasmuch as John Hickman and Ronald Heinzman had been notified by certified mail, return receipt requested, and which were received by them on July 20, 1971 and July 21, 1971, respectively. Mr. Messner himself unilaterally cancelled the hearing graciously extended by the Board of Education of the Township of Brick, and it was not cancelled because of 'receiving short notice' by the Brick Township Education Association, but was in fact cancelled by the New Jersey Education Association representative, Mr. Messner. Contained in said letter, again, are derogatory remarks inappropriately and uncalled for, directed against Mr. C. Stephen Raciti, Superintendent of Schools, alleging that he had the discourtesy to 'doze in court'."

The letter of reference herein (P-14) from respondent to the Superintendent is reprinted in its entirety below:

"Regarding your letter of August 10, 1971, I would like to make the following points:

"1. John Hickman and Ronald Heinzman were invited (in a letter signed by Mr. Ward, board at-

torney) to meet at the offices of Anton & Ward regarding the grievance we had initiated following their unjustified dismissal by the superintendent of schools.

"2. Apparently you did not know that this meeting was scheduled, which makes it another case of the left hand not knowing the business of the right hand. There are many of us and so few of you that it seems impossible that you would not know of a meeting of this magnitude unless there were forces afoot that wanted to keep you in the dark.

"3. Certainly you were aware of Mr. Anton's reference in court to the fact that we cancelled this meeting because of our receiving short notice (notice given through Hickman & Heinzman that is). I am only reminding you of this since you were in the court room and certainly heard him make much of it, and even if you were dozing at the time you surely should remember that he mentions it in his written brief—as chief administrative official of the district you most certainly read it . . .!

"4. Thank you for assuring us that it is not your intention to exclude the Association from grievance meetings. I think, however, the evidence indicated otherwise."

The hearing examiner leaves to the Commissioner's judgment whether or not the letter *per se* is illustrative of "insubordination" or of the "vindictive nature" of respondent, as charge by the Board. However, the hearing examiner notes that the letter does not, as charged herein, contain an allegation that the Superintendent "* * * had

the discourtesy to 'doze in court,'" but instead contains the words;

"* * * even if you were dozing at the time * * *."

Respondent testified (Tr. VI—962) that the facts, as she had recited them in the letter, were true as she understood them, but the Superintendent maintains (Tr. III—443) that he was unaware of instances in which he had ever excluded any teacher from "true" grievance meetings. The dispute herein lies in whether the "hearing" for the two teachers considered *sub judice* was a "true" grievance hearing or one of another kind.

It is the Board's representation that counsel for the Board was contacted directly by a representative of the New Jersey Education Association with a request for the hearing to consider the Board's determination with respect to the two teachers referred to in the charge (John Hickman and Ronald Heinzman). The Board also avers, through counsel, that the Superintendent was not notified of the scheduled "hearing." There was no direct testimony in this regard by anyone, however, including the representative of the New Jersey Education Association, Mr. Messner, who did testify with respect to another charge as a witness for respondent. (Tr. V—726)

CHARGE No. 14

"Mrs. Kathleen M. Pietrunti again exhibited a vindictive and insubordinate attitude toward the Superintendent of Schools, Mr. C. Stephen Raciti, all of which can be gleaned as an insight into her character, motivations and purposes, and which while

minor is perhaps illustrative of a greater purpose involving her. This is contained in a letter dated September 15, 1971, following in rapid succession the decision of the Superior Court, Chancery Division, to uphold the Board's decision not to rehire John Hickman and Ronald Heinzman following the decision of the President of the United States to enact a wage price freeze which negated the negotiations of Mrs. Kathleen M. Pietrunti and her fellow negotiators, and following her suspension as a tenure teacher employed by the Board of Education of the Township of Brick, and the filing of the initial charges as filed herein, and which contains a copy of this letter to be sent *inter alia* to 'Carmen Raciti'. It is to be respectfully noted that in all prior correspondence she addressed the Superintendent of Schools as he has chosen to be addressed, to wit: C. Stephen Raciti. While the Superintendent of Schools does not object to the name of Carmen, the utilization of this name in this manner by Mrs. Kathleen M. Pietrunti, in concluding that in some way the use of this name may be distasteful to the Superintendent, is indicative of her choice to deviate from the politeness of her previous correspondence as set forth in the letter of September 15, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'M', and repeated in a public speech given at a meeting held on orientation on September 1, 1971."

Respondent does not deny that she directed a copy of the letter of September 15, 1971, (P-15) to "Carmen Raciti," but maintains that she did not mean by her direction

to "humiliate" or "derrogate" him in any way (Tr. VI—963) She avers that the use of the name of "Carmen" on this occasion was an outgrowth of a previous "rap" session. Specifically, she said: (Tr. VI—963)

> "* * * A. Mr. Raciti explained why he went from Carmen S. Raciti to C. Stephen Raciti. He told us that often times he had received correspondence which addressed itself to Carmen, the female Carmen, when he was in guidance particularly. And so, because he had a repugnance to that, he decided to revert to C. Stephen. * * *"

It is also noted here that respondent used the name "Carmen," in reference to the Superintendent, in her speech of September 1, 1971. (P-1)

The hearing examiner believes that the charge herein to be of such minor consequence that it need not be considered by the Commissioner as substantial evidence against respondent. It is extremely difficult, in the judgment of the hearing examiner, to find serious fault with the choice by respondent of one or two possible names—both correct "given" names—on the basis of a conclusion by the Superintendent that respondent wanted to use the name because it was distasteful. The charge is patently based on speculation; therefore, in the face of respondent's denial and because the charge lacks proof, the hearing examiner recommends that it be dismissed.

Charge No. 15

> "Mrs. Kathleen M. Pietrunti again demonstrated insubordination, refusal to accept administrative authority and conduct unbecoming a teacher, ren-

dering her thereby unfit and action which is subversive of the discipline and morale of the school system, in an incident which commenced on or about September 14, 1970, and again on or about April 23, 1971.

"A. Robert Holmes, Subject Supervisor and direct superior to Mrs. Kathleen M. Pietrunti, and former Supervisor of Business Studies for the State Department of Education, has the following responsibilities as set forth in the minutes of the meeting of the Board of Education, a copy of which is annexed hereto and made a part hereof as Exhibit 'N'. Mr. Holmes directed the following suggestion in writing to Mrs. Kathleen M. Pietrunti concerning her lesson plan book, a copy of which is annexed hereto and made a part hereof as Exhibit 'O'. Mr. Holmes received from Mrs. Kathleen M. Pietrunti the following reply: 'I assumed you knew enough about the subject to know that plans are: 1. for the teacher to refer to 2. that what I have included for this week is sufficient and could be used as a guide by any one of the typing teachers on our staff. K.M.P.', which is a direct question of the administrative authority of the Subject Supervisor.

"B. On or about April 23, 1971, Mrs. Kathleen M. Pietrunti was questioned by her Subject Supervisor, Mr. Robert Holmes, concerning the fact that she was not in attendance in her classroom where she was supposed to be at 11:23 a.m. Mr. Holmes when he passed Mrs. Pietrunti in the hall, quietly interrogated her by saying, 'Gee, you're a little late, aren't you?' Mrs. Pietrunti replied, 'Shove it.'

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This is set forth in a report to Mr. Bart H. Brooks, from Mr. Robert Holmes, a copy of which is annexed hereto and made a part hereof as Exhibit 'P'. Mrs. Pietrunti replied in writing in a two-fold manner. Firstly, her short note to Mr. Holmes, a copy of which is annexed hereto and made a part hereof as Exhibit 'Q'. Then in response to a request made to Mrs. Kathleen M. Pietrunti by Mr. Bart H. Brooks, Mrs. Pietrunti in a note dated May 6, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'R', and 'R-1' replied at length. It is to be strongly noted that Mrs. Kathleen M. Pietrunti admits that she was in fact late to class on that day and did use the most unfeminine and unladylike retort of 'Shove it', and proceeded with a rationale and explanation in vindication which gives greater insight into her total personality as a teacher, concerning her attitude toward the administration, toward personal criticism, toward authority and cites therein a purported conversation between Anthony Lucca and Bart H. Brooks which is wholly at variance with the story related by Mr. Brooks concerning the Lucca incident. It is to be noted, however, that the Elizabethan curse word used to Mr. Lucca was used by a defiant student, and not a professional member of the community, to wit: a tenure teacher."

The hearing examiner finds no question of fact in Paragraph "A" of the charge herein. Pursuant to duties as enunciated and assigned to him by the Board of Education, (P-16) Mr. Robert Holmes, subject supervisor, had made certain suggestions to respondent in written form

concerning her lesson plans. (P-21) Respondent did, in fact, reply exactly as charged by written memo. (P-21B)

The hearing examiner notes no "question of the administrative authority" in respondent's reply, although there is a frank answer to the supervisor's criticism, which might be labeled curt or sarcastic, but is not so labeled in the charge.

With respect to Paragraph "B" herein, there is also no question of fact. By her own admittance, respondent was late for class on this one occasion and did direct Mr. Holmes to "shove it." (P-18) Her reason for tardiness on this occasion was that she had stopped to assist a girl in trouble. The reason is not challenged herein by the Board, and it is only respondent's reaction to criticism, as evidenced by her expression "shove it," which seems to pose the issue for the Commissioner's judgment. The question is whether or not such reactions as detailed herein are, as charged, a refusal to accept administrative authority and a representation of unbecoming conduct.

Two other facts of note are itemized with respect to this matter as follows:

1. The dialogue between respondent and Mr. Holmes was confined and limited to their hearing alone.

2. Respondent maintains she was told by the school principal that the incidents pertinent to this charge were not to be the source of a continuing dispute. (Tr. VI—970) Specifically, she stated that the principal had said:

"* * * as far as I am concerned this ends right here. * * *" (Tr. VI—970)

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CHARGE No. 16

"Mrs. Kathleen M. Pietrunti has illustrated by virtue of the speech hereinbefore referred to in charges filed with the Commissioner of Education a certain philosophy and tenor with respect to her conduct as to insubordination, unfitness to be a teacher in the school district, and has exhibited that she will continue to so conduct herself in accordance with the same tenor as contained in all the charges filed herein, and which is most clearly illustrated by the virtue of the fact that on September 7, 1971, she purported to apologize as having been too harsh on the Superintendent of Schools in her orientation speech of September 1, 1971. While the Board of Education questions the sincerity of the apology subsequent events indicated that the apology was totally insincere and not intended at any time by Mrs. Kathleen M. Pietrunti. While she was giving her 'apology' she was causing to be distributed copies of the speech of September 1, 1971, at the meeting on September 7, 1971. Sugject (sic) to her suspension, she announced in the news media that if she had to give the speech again she would."

When asked why she had apologized on September 7, 1971, for the speech (P-1) she had given on September 1st, respondent stated in direct testimony, at the hearing:

"* * * A. Upon reflection, conversation with new teachers, it appeared as though quite possibly that could have been the wrong place, insofar as it possibly did not afford Mr. Raciti an opportunity to respond. * * *" (Tr. VII—997)

Later, she stated the reason why her speech (P-1) of September 1 was being distributed at the same meeting that the apology, *ante,* was offered. She said the speech was distributed:

> "* * * A. So that all teachers in the district could readily see the reason for the apology for the September 1st speech, and to bury some of their misunderstandings about the September 1st speech, which may have been garnered from reading it in the press. * * *" (Tr. VII—997, 998)

The question for determination herein is whether or not the mere fact of the distribution of the speech (P-1) on September 7, 1971, was an evidence of insincerity. In the face of respondent's testimony and lacking other evidence to the contrary, the hearing examiner believes that the apology respondent gave must be accepted as an honest regret.

The hearing examiner recommends, therefore, that this charge, which, he opines, is vaguely worded and which lacks specificity, be dismissed.

No proof was offered in support of the last sentence of this charge. No defense was required.

Charge No. 17

> "Again illustrative of the fitness of Mrs. Kathleen M. Pietranti with respect to insubordination and her overall purpose which is conduct unbecoming a teacher and is subversive to the morale and discipline of the school district, this teacher stated verbally to Mr. Warren H. Wolf, Assistant Superin-

tendent of Schools, words to the effect when asked why she had made such accusations in her orientation speech on September 1, 1971, that 'We could let that go but he (referring to the Superintendent) has got to go', thereby an avowed purpose of Mrs. Kathleen M. Pietrunti to rid the school district of C. Stephen Raciti, Superintendent of Schools, and reaffirmed by a release to the news media subsequent to her suspension, 'Now I am President, but in years to come I will be a teacher and my voice will be as strong and as loud as it is now' at a public meeting of the Board of Education of the Township of Brick, at which time 400 residents, teachers and taxpayers had come to exhibit their almost unanimous support of Superintendent of Schools C. Stephen Raciti, and at which petitions containing the signature of some 1,200 residents had indicated their support of the Board of Education in its action in suspending Mrs. Kathleen M. Pietrunti."

The only facet of this charge requiring any comment is respondent's statement, "We could let that go but he has got to go." Mr. Warren H. Wolf, assistant superintendent of schools, was the only witness to testify concerning the truth of this charge, and he stated that it was his "opinion" that the words of the quote were spoken with reference to the Superintendent of Schools. (Tr. I—89)

There was no testimony from respondent concerning this aspect of the charge. However, respondent maintains that the last sentences of the charge do not constitute an indictment of any kind at all.

The hearing examiner concludes, from limited testimony, that respondent probably did say words to the

effect that "The Superintendent has got to go" in private conversation with the assistant superintendent of schools. However, he recommends that all other inferences and facets of the charge be dismissed.

CHARGE NO. 18

"Mrs. Kathleen M. Pietrunti has further committed conduct unbecoming a teacher by virtue of her unfeminine and unladylike remarks made in various public places of accommodation and on school premises, all of which are subversive of discipline and morale of the school district and all of which questions her fitness to be a school teacher.

"A. At a meeting of the District Improvement Council, Mrs. Kathleen M. Pietrunti enunciated a philosophy concerning all elementary teachers as 'elementary teachers have elementary minds'.

"B. On several occasions Mrs. Kathleen M. Pietrunti has called Superintendent of Schools C. Stephen Raciti 'C. Serpent Raciti' and a 'small man', or a 'little man', it not being determined whether she was referring to stature or intellect.

"C. While correcting school papers she came across a paper prepared by one of the students in the school district, and in making her professional evaluation thereof stated, 'This paper is so poor it is not good enough to wipe my ass', and which statement was made in the faculty room.

"D. At another time while being struck by a swinging door in the principal's office of the High School, and within hearing distance of two students, Mrs.

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Kathleen M. Pietrunti said to the teacher who had just motivated the door, 'You son-of-a-bitch, you did that on purpose'.

"E. At a place of public accommodation, Mrs. Kathleen M. Pietrunti, upon witnessing the arrival of the Board President William Bell, in an abortive attempt at humor said, 'Ding Dong Bell, Ding Dong Bell', and upon the departure of President William Bell said that Mr. Bell was a 'bald headed mental midget' and in amplification of her remarks later stated that he was 'a bald headed bastard'."

The sub-charges, *ante,* are discussed briefly *seriatim* below:

(A) A finding of "true in fact," with respect to this sub-charge, is impossible for the hearing examiner to make. All testimony concerning it was by adversary parties. While there is little doubt that respondent said something similar to the words contained in the charge, any finding that the words were spoken in a derogatory sense could only be judged authoritative if voice intonation were personally evaluated, and if the total meeting within which these or similar words were spoken was personally attended.

Respondent maintains that she "never said the words attributed to her herein, but that she said instead that "elementary teachers were elementary minded." (Tr. VI—974, 975) Her testimony was that she was not attempting to make a derogatory statement about elementary teachers as a group or about any elementary teachers, and that the total conversation within which these words

were spoken was concerned with representation on a school district council.

(B) The hearing examiner finds in a parallel manner with respect to this charge. Respondent admits she characterized the Superintendent as a "little man" on one occasion, but maintains it was in a jocular exchange, (Tr. VI—977) and she admits that she told the Superintendent he was commonly referred to as sea-serpent throughout the Brick Township District on another occasion. (Tr. VI-976) She stated that she had been told she was called "big mamma," (Tr. VI—976) prior to the time she used the expression "sea-serpent," as reported.

In the circumstances, and cognizant of the fact that frequently, teachers and administrators are eventually endowed with some kind of nickname—complimentary or otherwise—and finding it impossible to evaluate the exchanges herein from personal observation, the hearing examiner makes no finding that the attributed words, as charged, were "unfeminine," "unladylike," "subversive of discipline" or otherwise derogatory or deleterious.

(C) The statement attributed to respondent herein was purportedly made in the presence of teachers other than the one who testified that the charges were true. (Tr. I—42) Respondent herself denies it categorically, (Tr. VI—979) and other teachers called by her as witnesses in her behalf had no recollection of such a statement, although they were usually present with her during the first period of the day when the statement was allegedly made.

The testimony has not conclusively established the statement as true in fact, in the opinion of the hearing

examiner; therefore, the statement should not be included as a fact to be considered by the Commissioner.

(D) The hearing examiner finds this sub-charge to be true in fact as stated. The testimony shows that respondent was struck by a swinging door during the month of February or March 1971, and in surprise or annoyance, or in an instantaneous combination of both, uttered the expression attributed to her herein. (Tr. I—46) (Tr. IV—138)

Testimony to this effect was offered against her by a fellow teacher, who activated the door, (Tr. I—46) and by a substitute secretary who was standing nearby, (Tr. IV—138) and neither testimony was changed in essence, or in the credence attached to it, by rather extensive cross-examination, in the opinion of the hearing examiner.

It is also apparent from the testimony of these two witnesses that students acting as assistants in the general office area were present when the incident *sub judice* occurred, although their testimony was not elicited at the hearing.

(E) There was extensive testimony concerning the truth of this charge, replete with a number of detailed recitals of conversations that passed between a group of teachers and representatives of the New Jersey Education Association on the one hand, and a group of board members and administrators on the other. The place was the Red Lion Inn, in Brick Township, and the time of the incident was immediately subsequent to the meeting at which respondent was suspended by the Board, in September 1971.

However, despite the extensive testimony, there is little need to treat this charge in great detail. Respondent admits, and her own witnesses attest, that she called the President of the Board of Education a "bald headed mental midget," (Tr. VI—984) but denies that she referred to him as "ding dong Bell," or that she ever called him a "bald headed bastard." While the hearing examiner believes that someone, respondent or one of her group, certainly used the expression "ding dong Bell" with reference to Mr. Bell, President of the Board of Education, he cannot find, in the testimony concerning that evening, a preponderance of evidence that it was respondent who used it. Neither is he convinced by conflicting testimony that she used the expression "bastard" on that occasion.

The hearing examiner is convinced that both Mr. Bell and respondent were taunted in turn. Mr. Bell's response to the taunt addressed to him, as he left the Inn was to approach respondent's table and repeat the quotation from Hamlet which had been one reason for respondent's recent suspension. Respondent, in turn, regarded those words as a taunt and angrily replied:

> "A. Leave this place, you bald headed mental midget." (Tr. VI—984)

The finding herein is limited to that portion of the charge.

CHARGE NO. 19

> "Mrs. Kathleen M. Pietrunti, as President of Brick Township Education Association and as a tenure

teacher employed by the Board of Education of the Township of Brick again exhibited conduct unbecoming a teacher, and subversive of the discipline and morale of the school district, in that when her authority was questioned by another teacher in the school district, and when the teacher requested that his mailbox not be filled with what he termed 'garbage' being disseminated by the Brick Township Education Association through letters and bulletins and himself professionally attacked by the Association which was enforced and/or condoned by Mrs. Kathleen M. Pietrunti by virtue of a proposal, a copy of which is annexed hereto and made a part hereof as Exhibit 'S' and 'S-1', and as set forth therein, concerning Mr. Frederick Felz, all of which is conduct unbecoming a teacher and subversive of the discipline and morale of the school district and questions the fitness of Mrs. Kathleen M. Pietrunti to make a value judgment."

There was no real evidence offered in support of this charge. The two documents mentioned in the charge, and identified as Exhibit "S" and "S-1," were not admitted into evidence because Mr. Felz stated that he had no "concrete proof" that respondent was responsible for them, and that the documents were not otherwise found to be relevant. (Tr. I—152)

Accordingly, the hearing examiner recommends that this charge be dismissed.

CHARGE No. 20

"On September 23, 1971, the said Mrs. Kathleen M. Pietrunti did interfere with the performance of

> the duties of Mr. Martin Groppe, when Mr. Groppe had occasion to speak to and confer with a teacher, namely Mrs. Bittenbinder, for not being at her post or area, at which time the said Mrs. Kathleen M. Pietrunti stated, 'Why don't you tell him to take care of it', in support of which a copy of a letter is annexed hereto and made a part hereof as Exhibit 'T' over the signature of the aforementioned Martin Groppe. This incident occurred in the cafeteria at the Brick Township High School."

The hearing examiner finds this charge to be substantially true in fact. This finding is founded on the testimony of Mr. Groppe (Tr. II—295), on a memo Mr. Groppe submitted to the school principal on the day of the reported incident (P-24), and on a review of a deposition respondent herself made on January 5, 1972, prior to the beginning of the hearing.

The document from Mr. Groppe to the school principal is reported in full as follows:

> "In the performing of my responsibility as Cafe (sic) supervisor, today I found Mrs. Bittenbinder not at her post or area upon entering the east faculty lunch room. I reminded her that she should be at her assigned area, it was at this moment that Mrs. Pietrunti said loud enough for other teachers to hear. 'Why don't you tell him to take care of it.' I feel this was very un-professional & somewhat under-mining of my role as supervisor (sic) as a person I am insulted by her remark."

Respondent herself said, in the deposition mentioned, *supra,* at (p. 52), in response to a question as to whether

or not she admitted or denied saying, "Why don't you tell him to take care of it?":

> "A. I said something like that to Mrs. Bittenbinder."

This ends a recital of and discussion about the charges *per se*. However, the hearing examiner adds the following observations, which he opines have some relevance thereto:

> 1. The Superintendent was not awarded "early tenure," as respondent believed was the case, according to the testimony of the Superintendent on rebuttal. (Tr. VII—1118) This finding is related to Charge 10D.
>
> 2. There was some testimony at the hearing, which attributed a series of crude expressions to the Superintendent of Schools. If found true in fact, these charges would establish some grounds for a determination that respondent's purported or proved expressions were no cause for complaint because she used them in an atmosphere pervaded with crudity. However, the Superintendent is not charged with misconduct herein, and there is no finding that such counter charges are true in fact.
>
> 3. None of the charges herein involve students of respondent's classes or her teaching performance. Students other than those directly taught by respondent were involved only as spectators with respect to Charge 18(D).

Appendix C

In summary, the hearing examiner finds:

1. That Charges Nos. 2, 3, 4, 5, 6, 7, 10 ((A) through (G), and (I)), 13, 15, 17 as noted, and 20 must be examined by the Commissioner, as reported, for evidence that respondent encroached upon an administrative prerogative, or was otherwise guilty of conduct unbecoming a teacher in the public schools.

2. That the Superintendent did not fire the two teachers as alleged by respondent in her speech (P-1), and to this extent the charge by her, which the speech contained, was a distortion. (Charge No. 1)

3. That there is no concrete evidence that respondent's speech (P-1) "seriously interfered" with the operation or the administration of the Brick Township School System, as alleged. (Charge No. 8)

4. That respondent did call a fellow teacher a "son of a bitch" as alleged. (Charge No. 18 (D))

5. That respondent did call the Board President "a bald-headed mental midget" as alleged. (Charge No. 18(E))

6. That respondent did reply to the supervisor as charged. (Charge No. 20)

7. That Charges Nos. 9, 10II, 12, 14, 16, 17 (except as noted), 18, (A, B, C) and 19 should be dismissed for the reasons stated.

8. That Charge No. 11 was withdrawn by the Board.

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The legal arguments pertinent to the charges, *supra*, represent a diametrically opposed set of views.

On the one hand, respondent argues in the Motion to Dismiss, which was offered at the conclusion of the Board's case, and in the brief of counsel, that the charges, *sub judice*, and the proofs that were offered, present no reason at all to justify the imposition of any penalty. In this view, the disputes chronicled herein were the culmination of a long period of strained and steadily-deteriorating relations, which ensued when the Brick Township Teachers' Association, led by respondent, began to assert its rights—to press grievances, to express points of view different from those held by school administrators and the Board, and to demand that contracted privileges be afforded. In the brief of counsel, it is stated that:

> "* * * The real culprit is the newness of a relationship involving discussion and bargaining, adjustments, concessions, compromises, acceptance, tolerance, as well as firmness, strength, principle and all the other categories, where two bodies approaching a complex of problems from different points of view suddenly find themselves in confrontation. * * *"

Respondent says in retrospect that at the time of "confrontation," it is perhaps true that neither side distinguished itself in tact, tolerance, forbearance and understanding, but that this truth presents no reason for her dismissal.

Respondent avers that the Board, after a review of Charges 1 thru 9, evidently was concerned that it would not accomplish its purpose, and that Charges 10 thru 20 represent a concerted effort to garner every single item,

which might be of any use at all in an effort to bolster its case, despite the fact that the charges presented no cause for action at the time the incidents were alleged to have occurred. In respondent's view, however, all of the charges and the proofs, as presented, show:

> (a) No evidence that morale of the Brick Township School System's staff ever suffered as a result of things respondent is alleged to have said or done.
>
> (b) No evidence that she ever failed to carry out a single legitimate directive from the Board or school officials.
>
> (c) No evidence that respondent ever usurped, or took unto herself, an administrative function.

To the contrary, respondent maintains that she merely occupied the position of a gadfly, annoying the Superintendent and the Board by constant reminders that they should be considering the Teachers' Association as a properly-recognized bargaining unit. She also observes that the Board never filed a grievance against her, pursuant to the bargaining agreement, and that its charges now suffer from staleness.

Further, respondent maintains that a number of court determinations uphold her rights as a citizen to speak freely on all issues, which she regards as pertinent, and that those rights are not denied to her as she enters the school house door. In this regard, she cites *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, (1969); *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); and *New York Times Co.* v. *Sullivan*,

376 U.S. 254, 11 Ed. 686, 84 S. Ct. 710 (1964). Respondent refers also to *Puenter* v. *Board of Education of Union Free School District of Bethpage*, 24 N.Y. 2d 996, 250 N.E. 2d 232 (1969), remanded from *U.S. Supreme Court*, 392 U.S. 653 (1968), in which the New York Court stated that a teacher's actions were excessive, but, since there was no evidence of actual or threatened damage to the school system, there was no reason for disciplinary action.

On the other hand, the Board maintains that the right of free speech is not an absolute right, and that respondent's references, contained in the charges herein, to the Superintendent as a "villain" and to the administration as a "cancer" and a "mindless dictatorship" go beyond the permissive limits of protected free speech and destroy the shield of constitutional protection. In support of this contention, the Board also cites a principal court decision on which respondent relies; namely, *Pickering, supra*, and quotes extensively from *Thomas C. Knarr* v. *The Board of School Trustees of Griffith, Indiana et al.*, U.S. District Court. N.D. Indiana, decided September 25, 1970, 317 Federal Supplement 832, and *Bruce Jones* v. *Rev. Richard A. Battler, et al., Members of the Board of Education for the Town of Hartford, Defendants*, 315 F. Supp. 601 (1970). Additionally, the Board cites the following recent Commissioner's decisions: *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, Gloucester County*, decided by the Commissioner August 12, 1971; *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, decided by the Commissioner November 18, 1971, and *In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County*, decided by the Commissioner December 20, 1971.

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The Board's basic contention is that the charges leveled by respondent against the Superintendent in her speech (P-1, *supra*) were false, and that the speech *per se* was untimely, reckless, unprofessional and deserving of censure. In the judgment of the Board, *Chapter* 303, *Laws* of 1968 modified the powers and duties of a Board and its public employees, but conferred no right on employees to say or do the things attributed to respondent in the charges herein. Unbecoming conduct by a tenured teacher, in the Board's view, is still punishable under the statutes (N.J. S.A. 18A:6-10 *et seq.*).

Amicus Curiae supports the Board's position on all points. He argues that the employer-employee relationship imposes reciprocal rights and duties on both parties, and that the responsibilities of an employee to an employer include loyalty, respect, cooperation and dedication to the employer's best interests. In his view, these duties are not obliterated by the fact that employees have parallel rights to speak freely and negotiate collectively. *Amicus* cites *MacIntosh* v. *Abbot,* 231 Mass. 180, 120 N.E. 383 (1918); *Marchetto* v. *Central R. Co. of N.J.,* 9 N.J. 456, 466 (1952); *Breen* v. *Larson College,* 137 Conn. 152, 75A. 2d 39 (1950); and *Greene* v. *Monmouth College,* an unreported case decided by Judge Lane in the *Superior Court, Chancery Division,* on January 6, 1969, Docket No. C-1621-66. In this latter decision, Judge Lane had cited, in turn, 9 *Williston, Contracts* (3d ed. 1967) and *Myers* v. *American Well Works,* 114 F. 2d 252 (4 Cir. 1940), *certiorari denied* 313 U.S. 563. From Williston, *supra,* p. 59, *Amicus* cites the following paragraph:

> "* * * The relation of employer and employee requires on the part of each an observance of the

> elementary principles of good behavior. The extent of the duty and the consequences of a breach of it must vary necessarily with the character of the employment. Insolvent or disrespectful language or conduct on the part of a servant will justify dismissal. * * *"

and from *Myers, supra,* at p. 253, the following; a paragraph which he considers applicable:

> "* * * In addition, this first contract of employment, we think, is subject to the implied condition that the conduct of the employee towards the employer shall at least be respectful and free from insolence, disrespect and insubordination. * * *"

* * *

The Commissioner has reviewed the report of the hearing examiner and concurs that Charges Nos. 9, 10(H), 12, 14, 16, part of 17 except as noted, 18 (A, B, and C), and 19 should be dismissed. He will, accordingly, not consider these charges in a judgment on the totality of the matter *sub judice.* He will consider the remaining evidence and findings in the two major sequences of the report *seriatim.*

I.

The Commissioner observes that the evidence herein is, for the most part, stipulated. Respondent did make the speech (P-1, *supra*), and her statements contained therein are a clear matter of record. The judgment made by the hearing examiner as to the factual nature and truth of the allegations made by respondent in the speech are also accepted by the Commissioner. Thus, the Board's charges

that the speech contained untruths or distortions are found to be true in fact, and only in a limited sense, with respect to Paragraphs 1 (that the Superintendent "fired" two teachers) and 4 (that the Superintendent was "intimately" embroiled in politics).

However, the truth of falsity of these and the other charges, which respondent made on September 1, 1971, cannot be adjudged as the only points of determination at issue herein in the Commissioner's opinion, although the Board's case would certainly be stronger, if all of respondent's allegations were proved without doubt to be false. That some of them were not so proved does not obviate the necessity for a determination of the propriety of the whole speech *sub judice*. Why were such charges leveled at the Superintendent on this occasion? Were they appropriately raised? How should the charges be viewed when read in *pari materia*?

The Commissioner determines that respondent's speech (P-1), which she gave on September 1, 1971, was, in its total essence, a derogatory personal indictment of the Superintendent of Schools, was presented inappropriately to the wrong forum, and was patently unfair to the Superintendent in that it was given in complete disregard of his legal and human rights to a fair and impartial hearing on such serious complaints. The Commissioner determines, therefore, that respondent was guilty of conduct unbecoming a teacher in the public schools because the speech was made in such circumstances.

This finding is based on three principal observations:

1. The first two charges (Paragraphs 1 and 2 of P-1) leveled by respondent at the Superintendent had been adjudicated in proper forums, and deci-

sions in both matters had been reached long before the meeting of September 1, 1971. The Superintendent was never found guilty, in either case, of improper activity. Therefore, there was no apparent rhyme or reason for the resurrection of such disputes before the group of new teachers at the above-mentioned meeting.

2. If respondent thought the rest of her accusations were true in fact—that the Superintendent was guilty of improper political activity, of a dereliction of duty, of threatening a man's professional life, or that he was a "villain"—she had every right to process her complaints against him in the same manner as he processed those against her herein. Such charges were clearly ones, that if found true in fact, were worthy of processing and adjudication in the manner prescribed by the statutes.

3. Having no factual basis to even include the first two paragraphs of her speech as any evidence of "villainy" on the part of the Superintendent, and respondent having failed to complain in the proper forum about such serious charges as she made in Paragraphs 3 and 4 of her speech (P-1), the Commissioner holds that mention of any of them was improper in a prelude to the characterization of the Superintendent which followed: "the man who just spoke to you fits Hamlet's description of his uncle—that he does smile and smile and smile and yet remain a villain."

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II.

The Commissioner has reviewed the charges remaining, for determination of propriety in the context of charges that respondent was insubordinate and guilty of conduct unbecoming a teacher. He finds two serious evidences of such conduct and other evidences of lesser import. These serious evidences, in the Commissioner's judgment are clearly present in the recitals relative to Charges 10 (A and C) and in Charge 18(P).

Charges 10 "A" and "C" are concerned with the letters of intent (P-5), and in this regard, the Commissioner opines that the Brick Township school administration had a responsibility, in their planning and preparation for the 1971-72 school year, to determine which staff members intended to return to their assignments in September. This has been a traditional practice.

Since this is so, it was, in the Commissioner's view, an insurbordinate gesture for respondent to "* * * urge all tenure teachers in the district not to sign this letter * * *," but the most serious insubordination follows that urging, for respondent then instructed the teachers not to:

> "* * * comply with *any request* that will make the Board's job any easier." (Emphasis supplied.)

Such an instruction, by the President of the Teachers' Association, if followed by a majority of staff members, could have seriously crippled the effective operation of the Brick Township Schools. The Commissioner holds, therefore, that respondent's injunction considered herein was, on its face, an insubordinate act. As the Supreme Court of New Jersey said in *Board of Education, Borough of*

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Union Beach v. *N.J.E.A. et al.*, 53 N. J. 29 (1968), at page 40:

> "* * * although citizens, individually and in association, may thus seek to 'coerce' a public body to their wish, there is no right to achieve that end by disabling the public body from acting at all. * * *"

The expression addressed by respondent to a fellow teacher—"You son of a bitch, you did that on purpose"—which is the subject and finding of Charge 18(D), is also, in the Commissioner's judgment, an evidence of conduct unbecoming a teacher in the public schools, despite the reported provocation, because by the elicited testimony, there were students present at the time. Such expressions, in the Commissioner's belief, are not covered by a Constitutional shield when uttered in such circumstances.

The remaining charges—Charges 10 (B, D, E, F, G and I), 14, 15, 18 (A, B, C, and E) and Charge 20—with the proofs as elicited and embracing the circumstances as recited by the hearing examiner, are, the Commissioner finds, lesser charges than the ones discussed, *supra*, in this section. Nevertheless, in the Commissioner's judgment, when taken together, the brusque expressions and terms "arbitrary and mindless dictatorship," "shove it," "bald headed mental midget," "tell him to take care of it," etc. are expressions that provide reinforcement to the principal findings relative to Sections I and II, *supra*. Even if this were adjudged not to be so, the proofs herein provide little reason to believe that respondent has, in the past, or could in the future, be seriously interested in aiding the Brick Township Board to provide the "thorough and efficient" school system required by Constitutional presciption.

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In the determinations reported, *supra,* with respect to both of the principal groups of charges herein, the Commissioner has been ever mindful of the need, in our society, to balance the rights of the individual to speak his mind freely with the needs of a school system to conduct its business in an orderly reasoned manner. As the Court said in *Pickering, supra,* (at page 568):

> "* * * The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. * * *"

The determinations herein have been made in the context of this opinion.

Having determined that respondent has been guilty of unbecoming conduct and insubordination, it is necessary now to determine the penalty, which must be assessed. In this regard, the Commissioner holds that the speech (P-1), even standing alone, warrants a finding that respondent has forfeited her right to continued employment in Brick Township. This holding is grounded on the belief that local boards of education which are required by constitutional prescription to operate thorough and efficient systems of public education, cannot be expected to carry out this mandate in an atmosphere of turmoil and conflict between school administrators and other employees. When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premeditated and calculated manner (the speech, P-1) the Commissioner believes that the tenure

rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.

In addition to the finding, *ante,* with respect to respondent's speech (P-1), there are two other principal findings from the second section, *supra,* and the finding with respect to the lesser counts. The combined determinations, in the Commissioner's judgment, comprise a series of incidents to which the Court referred in *Redcay* v. *State Board of Education,* 130 N. J. L. 369, when it stated at page 371:

> "* * * Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. * * *"

Accordingly, the Commissioner determines that respondent should be dismissed from her employment with the Brick Township School System, effective on the date of her suspension by the Brick Township Board of Education on September 8, 1971.

CARL L. MARBURGER
Commissioner of Education

July 19, 1972

APPENDIX D

Decision of the State Board of Education

(Filed—April 4, 1973)

In the Matter of the Tenure Hearing of KATHLEEN M. PIETRUNTI, School District of the Township of Brick, Ocean County.

Decided by the Commissioner of Education, July 19, 1972.

Decision on Motion by the Commissioner of Education, June 14, 1972.

For the Respondent-Appellant (Decision of July 19, 1972), Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Petitioner-Appellant (Decision of June 14, 1972), Anton and Ward (Martin B. Anton, Esq., Donald H. Ward, Esq., of Counsel)

For the New Jersey School Boards Association and the New Jersey Association of School Administrators, *Amicus Curiae,* Cook & Knipe (Thomas P. Cook, Esq., of Counsel)

PART I

The decision of the Commissioner of Education of July 19, 1972, dealing with the dismissal of Kathleen M. Pietrunti from her employment with the Brick Township School System, is affirmed.

We are aware that an arbitration award in a proceeding between the Brick Township Education Association and the Brick Township Board of Education handed down February 22, 1973, held, among other things, that the

Appendix D

Brick Township Board of Education did violate the collective bargaining agreement with the Association by including Charge No. 15 in its specifications against Kathleen M. Pietrunti. The Brick Township Board of Education was ordered, by the award, to file a copy of same with the State Board of Education, which has been done. We are also advised that the arbitrator's award has been appealed to the New Jersey Superior Court.

Without concurring in the arbitrator's award or in any way agreeing to its propriety or validity, we make this decision without consideration of Charge No. 15 and have taken such action as has eliminated the effect of the filing of Charge No. 15. Having eliminated the effect of Charge No. 15, we are of the opinion that the multiplicity and severity of the remaining charges are more than sufficient to sustain affirmation of the Commissioner's decision.

PART II

We reverse the June 14, 1972, decision of the Commissioner of Education, on the motion to grant Kathleen M. Pietrunti compensation at her regular salary pursuant to the provisions of and imposed by N.J.S.A. 18A:6-14, as amended pursuant toL. 1971, c. 435 § 2, eff. February 10, 1972. Kathleen M. Pietrunti was suspended without pay from her teaching duties by the Brick Township Board of Education on September 8, 1971, some five months prior to the effective date of N.J.S.A. 18A:6-14, as amended. We subscribe to the rule of statutory construction, that statutes will not ordinarily be given retroactive effect, unless it is the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. Under the circumstances, we do not give retroactive ef-

fect to N.J.S.A. 18A:6-14, as amended, and determine that no compensation should be awarded Kathleen M. Pietrunti.

Mrs. Hugh Auchincloss, Mrs. Marion G. Epstein, Calvin J. Hurd, Esq., and Mrs. Ruth Mancuso dissent from Part II above.

April 4, 1973

APPENDIX E

New Jersey Constitution and Statutes

N. J. Constitution, Art. 1, Par. 19:

"Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

N.J.S.A. 34:13A-1. Short title

"This act shall be known and may be cited as 'New Jersey Employer-Employee Relations Act.'"

"34:13A-5.3 Employee organizations; right to form or join; collective negotiations

"Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to any managerial executive except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in

collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

"Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such suit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conidtions of employment are made only through nego-

tiation with the majority representative; and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

"A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

"When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Appendix E

"Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes."

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-406

KATHLEEN M. PIETRUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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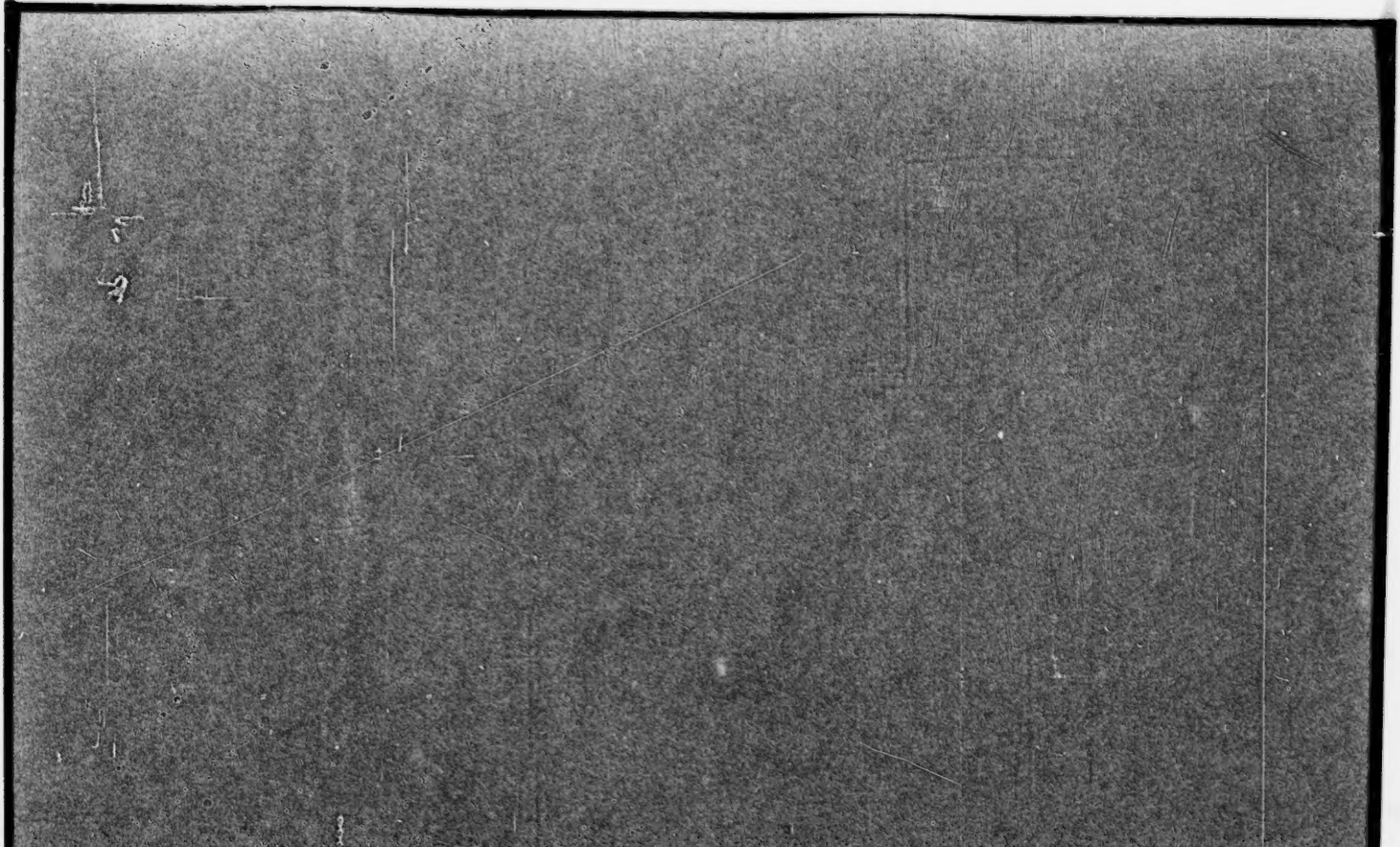

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-408

KATHLEEN M. PIETRUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted where it appears that the action of a state agency in dismissing a teacher and the affirmance of that dismissal by a state court was substantially grounded in matters as to which

there is no claim of a denial of a federal constitutional right?

2. Did the appellate court err in considering as one of the bases of dismissal of a teacher the fact that she gave a speech at an orientation meeting for new teachers in which she directed personal and professional abusive criticism against the Superintendent of Schools?

Counter-Statement of the Case

On September 7, 1971 respondent Brick Township Board of Education adopted pursuant to N.J.S.A. 18A:6-10 *et seq.* a resolution certifying to the State Commissioner of Education nine charges against petitioner Kathleen Pietrunti, a tenured teacher, and indicating that such charges, if proven, would warrant her dismissal. By the same resolution, the Board suspended petitioner from her teaching duties. On October 11, 1971, the Board certified to the Commissioner eleven supplemental charges against her.

After a hearing, the Commissioner found that the evidence supported several charges against petitioner sufficiently serious to warrant her dismissal. With certain exceptions noted in his decision, the Commissioner sustained the Board's charges relating to a critical speech given by petitioner in her capacity as president of the Brick Township Education Association. The Commissioner upheld the Board's charge that the speech contained untruths and distortions and also found that it constituted a derogatory personal indictment of the Superintendent of Schools which had been presented in the wrong forum and was patently unfair to him.

The Commissioner also sustained certain charges unrelated to the September 1 speech, finding charges 10(A),

10(C), and 18(D) to be the most serious. Charge 10(A) alleged that in her capacity as president of the Education Association, petitioner had improperly directed tenured teachers not to comply with any request that would make the Board's job easier, and specifically not to sign letters of intent customarily issued by the Board each spring to ascertain which teachers planned to return in the fall. Charge 10(C) asserted that petitioner had interfered with the Superintendent's administrative duties by advising teachers to send the school administration a letter prepared by the Association in place of the official letter of intent. The Commissioner, sustaining Charges 10(A) and 10(C), found petitioner guilty of insubordination, and held that her actions, if followed by a majority of teachers, could have crippled the effective operation of the schools. Charge 18(D) involved an incident in which petitioner, acting outside her role as president of the Association, called another teacher a "son of a bitch" in front of students. Despite a claim of provocation, the Commissioner found this incident evidence of conduct unbecoming a teacher. He concluded that the findings of insubordination and behavior unbecoming a teacher both in connection with the September 1 speech and in a series of other incidents warranted petitioner's dismissal.

Following this determination, an appeal was filed with the State Board of Education which on April 4, 1973 affirmed the Commissioner's decision dismissing petitioner. An appeal was then taken to the Superior Court of New Jersey, Appellate Division, which affirmed the State Board's decision in a per curiam opinion rendered on April 23, 1974.* In that decision the state appellate

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* Petitioner has failed to name the State Board of Education as a respondent. It is assumed that this omission was accidental since the State Board was a named respondent in the state courts and appropriate service has been made by petitioner upon the Attorney General of New Jersey as counsel for the State Board.

(Footnote continued on following page)

court concluded that the record supported the Commissioner's findings and his conclusion that petitioner had behaved in a manner unbecoming a teacher and not protected by the First Amendment. In particular, the Appellate Division found that petitioner had sought to undermine the authority of her superiors, by interfering with their established procedures in circulating alternative questionnaires concerning continuing employment and advising other teachers to refuse to cooperate with the local board in any way, that she had spoken out in a place and in a manner which could only throw into question her own professionalism and commitment to the furtherance of the educational process in her school district, and that she had attacked a superior with whom she would be expected to have further professional contact both as a teacher and as president of the teachers' Association, thus undermining a professional relationship, doing so in an inappropriate public forum rather than pursuing available grievance procedures.

On July 22, 1974 the New Jersey Supreme Court denied petitioner's petition for certification. Pietrunti filed her petition for writ of certiorari on October 10, 1974.

(Footnote continued from preceding page)

It is New Jersey law that where an appeal is taken from the quasi-judicial decision of a state agency, that agency is a party to the appeal. Pressler, Current N. J. Court Rules R. 2:5-1(e) and Comment thereon Rule 21(4) requires that all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.

ARGUMENT

POINT I

The court should not grant a writ of certiorari because the state court's decision was substantially grounded in matters as to which there is no claim of protection under the First Amendment.

It is well established that the court only has jurisdiction to review the judgment of a state court where the record shows that a federal question was raised, and that it was decided adversely to the petitioner. The record must also show that the federal question was necessarily involved in the decision, and that the state court could not have given a judgment without deciding it. If that judgment can be sustained on other than federal grounds the Court will not revise it, even though a federal question may also have been decided, and even though that question may have been decided incorrectly. *Williams* v. *Kaiser,* 323 U.S. 471, 477-478 (1945); *Smith* v. *Adsit,* 83 U.S. 185, 189 (1873).

In the instant case, twenty charges against petitioner were certified to the Commissioner by the local school board pursuant to N.J.S.A. 18A:6-10, which lists as grounds for proper dismissal of a teacher inefficiency, incapacity, unbecoming conduct or other just cause. The Commissioner concluded that portions of three charges and five other charges in their entirety should be dismissed. He considered the remaining items in two categories, those arising out of a series of incidents involving petitioner's behavior as a teacher in Brick Township (98a-100a), and those relating to the September 1 speech given by petitioner at the orientation meeting for new teachers (95a-97a). It is apparent from the language of the Com-

missioner's decision that he divided his consideration of the charges in this manner for practical reasons, to deal with all charges arising out of the same fact situation together, but that his final decision to dismiss petitioner was based on her general pattern of insubordinate and unbecoming behavior as illustrated by each of the charges sustained.

The Commissioner found evidence of insubordination in petitioner's urging members of the teachers' association of which she was president not to comply with any request that would make the local board's job any easier, and specifically not to sign the annual letter of intent. The Commissioner noted that if this recommendation had been followed by a majority of the teachers it ". . . could have seriously crippled the effective operation of the Brick Township Schools . . ." (98a). The Commissioner found further evidence of behavior unbecoming a teacher in petitioner's decision to address a fellow teacher as a "son of a bitch" in front of students. The Commissioner also found evidence of unbecoming conduct in petitioner's orientation day speech, terming it a derogatory personal indictment of the superintendent presented inappropriately in the wrong forum and patently unfair to him. Finally, the Commissioner concluded that, viewing the entire pattern of conduct set forth in the record, together with other proven examples of inappropriate behavior, petitioner had exhibited continuing insubordination and other forms of conduct unbecoming a teacher, inconsistent with her own effectiveness in the school system and in turn with effective education in that system.

In affirming the Commissioner's decision the appellate court relied on a similar range of evidence of petitioner's unbecoming behavior, noting that while the orientation speech in itself was sufficient to warrant petitioner's dis-

missal, the other charges sustained by the Commissioner unrelated to that speech supported the basic conclusion that petitioner was unfit to continue as a teacher. The court placed particular emphasis on the insubordination shown by petitioner's advice to association members not to cooperate with the local board in any way and on the inappropriate conduct evidenced by a series of incidents involving "brusque" language and behavior upon which the Commissioner had also relied as evidence of a pattern of unbecoming behavior (16a-17a). The appellate court also found petitioner's orientation day speech to be an insulting and vituperative attack on the character of her superiors unprotected by the First Amendment. The court concluded that the Commissioner's findings and conclusions were substantially supported by the record and affirmed.

A review of both the Commissioner's decision and the court opinion affirming it reveals that while a federal constitutional question was raised and considered in connection with some of the charges against petitioner, her dismissal was also based in substantial part upon charges unrelated to the federal question raised. While concluding that petitioner's dismissal could have been justified on the basis of her speech alone, the appellate court gave substantial weight in its opinion to evidence of a pattern of behavior considered unbecoming conduct for a teacher, unrelated to the September 1 speech. In view of the emphasis placed in the appellate court decision, it appears that even if petitioner had never given that speech her dismissal could still have been upheld on the basis of her general and consistent pattern of unbecoming conduct.

In the absence of any clear showing that the state appellate court relied only or primarily on federal grounds for its decision, it is respectfully submitted that this case

does not provide an appropriate context in which to consider the federal constitutional questions which petitioner has attempted to project for the Court's discretionary review.

POINT II

The petition for writ of certiorari should be denied because the state court has correctly applied federal constitutional standards in concluding that irresponsible and inflammatory speech personally critical of a superior falls outside the protection of the First Amendment and is a proper basis for discharge of a public employee.

Although teachers may not be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens because of their occupation, their right to speak is not unlimited. In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the Court clearly indicated that the State's interest as an employer in regulating the speech of its employees exceeds its interest in regulating the speech of its citizens in general. *Id.* at 568. The problem, the Court observed:

> ". . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

While the Court in *Pickering* provided "some of the general lines" to be followed in balancing these competing interests, it refrained from establishing a general standard applicable to all such expression cases "(b)ecause of the

enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superior, against whom the statements are directed, to furnish grounds for dismissal . . .". *Id.* at 569.

The specific facts of the case were critical to the determination in *Pickering,* and should therefore be briefly reviewed here. Pickering, a high school teacher, had been discharged for writing a letter to a local newspaper which criticized the school board and it superintendent of schools for their allocation of school funds between education and athletic programs and for the manner in which they had informed the district's taxpayers of the reasons why additional tax revenues were being sought. *Id.* at 569. His letter was a response to earlier letters to the newspaper by the superintendent of schools and a group of teachers. *Id.* at 566. The letter, factually untrue in certain respects, had been sent soon after voter defeat of a proposed increase in school taxes (391 U.S. at 571), and addressed issues then currently the subject of public attention (391 U.S. at 572) and ultimately determinable at the polls. *Id.* at 566-7. The Court concluded that in that factual context a teacher may not be discharged from public employment because of the exercise of his right to speak to the voters on issues of public importance, in the absence of proof of false statements knowingly or recklessly made by him. *Id.* at 574.

However, the opinion should not be read to establish a broad immunity applicable to all critical statements by teachers. The *Pickering* court suggested that the outcome might be different where such statements are directed towards a person with whom an employee would normally be in contact in his daily work (391 U.S. at 569-70 and n. 3), where critical public statements are made by an

employee in a position involving a great need for confidentiality (391 U.S. at 570 n. 3) or where an employee speaks publicly before submitting complaints about school operations to his superiors pursuant to an established grievance procedure. *Id.* at 572 n. 4. In addition, the Court inferred that dismissal might be permissible in cases involving false statements that were particularly difficult to rebut (391 U.S. at 572) or in situations where erroneous public statements are shown or can be presumed to have either interfered with the teacher's classroom duties or to have interfered with school operations generally. *Id.* at 572-73.

Pickering indicates that in analyzing the First Amendment rights of a public employee speaking as a citizen the subject matter of the speech, the manner and occasion for its delivery and the interests the speech advances are important considerations. *See e.g. Clark* v. *Holmes,* 474 F. 2d 928, 931 (7th Cir. 1972) *cert. den.* 411 U.S. 972 (1973). In particular, a school board has a legitimate interest as an employer in preventing its employees from engaging in inflammatory rhetoric personally critical of a superior. *See e.g. Duke* v. *North Texas State University,* 469 F. 2d 829 (5th Cir. 1972), *cert. den.* 412 U.S. 932 (1973). In sum, in balancing the interests of the teacher and his employer as required in *Pickering,* weight must be given to the time, place, and in fact total circumstances under which the teacher's challenged speech occurred.

In affirming the State Board of Education's decision, the state appellate court applied the guidelines developed in *Pickering* and subsequent federal cases, and concluded that petitioner's behavior was clearly distinguishable in its timing, the manner of its delivery, the position of the person speaking and of the persons spoken to, the nature of the subjects spoken about, and the apparent effect of the speech upon continuing professional relationships,

particularly when viewed in the context of petitioner's continued pattern of insubordinate and unbecoming behavior set forth in Point I of this brief. Such behavior is clearly not protected by the First Amendment, and is an appropriate basis for a teacher's dismissal.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that Pietrunti's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of the State of
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NOV 11 1974
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-608

KATHLEEN M. PIETEUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-408

KATHLEEN M. PIETRUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The order of the Supreme Court of New Jersey denying certification to review the decision of the Appellate Division of the Superior Court of New Jersey was rendered without opinion on July 22, 1974, and is set forth at Appendix B (26a) of the petitioner's petition.

The opinion of the Appellate Division of the Superior Court, rendered April 23, 1974, is reported in 128 N.J. Super. 149, 319 A.2d 262, and is set forth in Appendix A (1a) of petitioner's petition. This judgment affirmed petitioner's dismissal from employment with the school district of the Township of Brick, Ocean County, New Jersey, directed by the Commissioner of Education of the State of New Jersey, which was affirmed by the New Jersey State Board of Education. The Commissioner's Decision is dated July 22, 1972, and is set forth in Appendix C (27a) of the petition. The State Board's Decision is dated April 4, 1973, and is set forth in Appendix D (26a) of the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether a teacher can be dismissed on the basis of her intemperate and vituperative attacks on her superior, her "unprofessional" language, and her urging of other faculty members to disobey regulations of the school board?

Constitutional Provisions Involved

The applicable United States constitutional provisions are the first and fourteenth amendments.

Statement

Petitioner's concise statement is accepted with the following corrections and additions: The Commissioner of Education did not hold that the orientation day speech was the sole reason for the discharge, as the petitioner alleges at p. 6 of the petition. Rather, the Commissioner and the Appellate Division also expressly considered the petitioner's instruction to teachers not to comply with any request that would make the Board's job any easier (98a), and her urging of all teachers not to return "intent" letters (98a). Also, the petitioner's use of the phrases "son of a bitch" and "bald-headed mental midget," among others, was held by the Commissioner not to be constitutionally protected.

ARGUMENT

I.

The decision below is clearly correct.

An analysis of this Court's opinion in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), mandates a conclusion that the decision of the Appellate Division of the New Jersey Superior Court is clearly correct.

The decision of the Appellate Division of the Superior Court of New Jersey clearly follows the teaching of *Pickering,* in recognizing that a teacher's first amendment rights are not absolute. As this Court stated in *Pickering*:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly

> from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

391 U.S. at 568.

This general principle that the first amendment rights of a public employee are not absolute has been recently reiterated by this Court in *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974).

The Appellate Division's opinion cannot be interpreted to hold that the petitioner forfeited her rights of free speech because of her status as a teacher. Rather, it recognizes that the petitioner's rights of free speech must be balanced against the respondent school board's interest in promoting the efficiency of the public services it performs.

It should be noted that the petitioner was not dismissed because of the content of her speech, but rather, because of the potentially disruptive effect her speech had on the efficient operation of the school system. Such a rationale is entirely consistent with the teaching of *Pickering*.

In recognizing "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," this Court "[did] not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 391 U.S. at 569. However, this Court articulated certain factors, the presence of which would take the teacher's statements out of the protection of the first amendment:

> (1) Whether the statements were directed toward any person with whom the teacher would normally be in contact in the course of her daily work as a teacher, thus raising the question of maintaining either discipline by immediate superiors or harmony among co-workers.

391 U.S. at 569-70.

> (2) Whether the teacher's relationship with the target of the criticism was the kind of close working relationship which required personal loyalty and confidence.

Id. at 570.

> (3) Whether the statements had any detrimental impact on the operation of the school or on the performance of the teacher's daily duties.

Id. at 572-73.

> (4) Whether the statements were matters of legitimate public concern.

Id. at 571. *See also Clark* v. *Holmes*, 474 F. 2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

Applying these guidelines to the instant case, it is clear that the Appellate Division opinion, holding that there has been no violation of the petitioner's first amendment rights, is correct.

The respondent's interest in "encouraging a close and personal relationship between the employee and his superiors" clearly outweighs the petitioner's right to absolute freedom of speech. In *Chitwood* v. *Feaster*, 468 F. 2d 359 (4th Cir. 1972), holding that bickering and running disputes with one's superiors were not "protected speech," the court concluded that:

> A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

468 F. 2d at 361.

Similarly, in concluding that the right of a public school teacher to criticize the school administration on matters of public concern was a limited right, the Fifth Circuit in *Moore* v. *Winfield City Board of Education*, 452 F. 2d 726 (5th Cir. 1971), held that the Board's failure to renew a teacher's employment contract, after the teacher made a speech disparaging co-workers, teachers, and the school administration, was not motivated by the teacher's exercise of her constitutionally protected freedom of expression.

Since the petitioner's statements were directed towards the superintendent of schools, a person with whom the petitioner, by necessity, should have a close working relationship, and were detrimental to harmony among co-workers and the maintaining of discipline, these statements were not "protected speech." Accord, *Watts* v. *Board of Curators, University of Missouri*, 363 F. Supp. 883 (W.D. Mo. 1973), *aff'd*, 495 F. 2d 384 (8th Cir. 1974); *Bowles* v. *Robbins*, 359 F. Supp. 249 (D. Vt. 1973); and *Watts* v. *Seward School Board*, 454 P. 2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970). As stated in *Watts* v. *Seward School Board, supra*:

> What appellants did . . . could not help but be detrimental, not only to discipline, but also to harmony among appellants' co-workers . . . .

454 P. 2d at 735.

The petitioner's direction to faculty members, urging them to refuse to comply with an administrative request that they file letters with respect to their intentions for the succeeding year, is clearly not "protected speech." In *Whitsel* v. *Southeast Local School District,* 484 F. 2d 1222 (5th Cir. 1973), a teacher, who encouraged disobedience to directions given to the students by the principal to return to their classes during a demonstration, was dismissed. The court concluded that the fact that the teacher's remarks impliedly countermanded the direction of his superior placed those remarks outside the protection of the first amendment, and thus his dismissal did not contravene constitutional protections. *See also Tygrett* v. *Washington,* 346 F. Supp. 1247 (D.D.C. 1972).

In the instant case, the interests of the respondent school board in knowing which teachers would be returning the following year, in maintaining the loyalty of the teachers to the school system, and in discipline, clearly outweigh the petitioner's alleged free speech right.

Unquestionably, a teacher's use of vituperative and intemperate language is not protected by the first amendment. In *Amburgey* v. *Cassady,* 370 F. Supp. 571 (E.D. Ky. 1974), the court held that a teacher who was excessively critical and derisive of duly constituted school authorities, and who denounced them personally in abusive language to other teachers and school staff personnel, abused her right to criticize internal school operations, and thus her constitutional rights were not violated by the failure of the board of education to reemploy her. Similarly, in *Duke* v. *North Texas State University,* 469 F. 2d 829 (5th Cir. 1973), *cert. denied,* 412 U.S. 932 (1973), the court of appeals held that the use of profane language in a university teaching assistant's speeches criticizing the university administration and policies were not protected by the first amendment:

> As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection.

469 F. 2d at 840.

Similarly, in *Starsky* v. *Williams*, 353 F. Supp. 900 (D. Ariz. 1972), in holding that the plaintiff's calling a school official a "bastard" was not subject to first amendment protection, the court concluded that the school's interest in discipline in demanding some minimum of courtesy in a faculty member's relationships with school officials outweighed the free speech interest. 353 F. Supp. at 917.

In *Jones* v. *Battles*, 315 F. Supp. 601 (D. Conn. 1970), the district court held that statements by a teacher at an open public hearing before the school board in which the teacher labeled the director of secondary education a liar and questioned the honesty and competence of the director and the entire administrative staff of the board of education was not constitutionally protected. The refusal of the board of education to renew the teacher's contract did not violate his right to freedom of speech. The court stated:

> The Court finds that plaintiff's abusive language directed toward his nominal superior was of such a nature as to destroy any likelihood of future amiable professional relationship between him and the administrative staff. To order that the plaintiff be rehired into this school system under Dr. Barry's general supervision would invite friction and destroy staff morale. Those who would ultimately

> suffer as a result of such an enforced relationship would be the school children.

315 F. Supp. at 608.

The petitioner alleges that since her statements were on matters of public concern, they are constitutionally protected. However, as the Appellate Division correctly noted:

> [A]ppellant chose to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular. In doing so, she forfeited her claim to First Amendment protection.

Petitioner's petition for certiorari at 19a.

There is no requirement of a showing of actual disruption of the operation of the school system, since the factors articulated in *Pickering* are present in the instant case. As stated by the Fifth Circuit in *Birdwell* v. *Hazelwood School District*, 491 F. 2d 490 (8th Cir. 1974):

> In a situation of potential disruption there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures.

491 F. 2d at 494.

The Appellate Division correctly rejected the petitioner's attempt to clothe herself with additional first amendment protection because she was a union official. The petitioner was not dismissed on the basis of her union activity. Courts have rejected the assumption that whenever a teacher who is active in union affairs is not rehired, the school board's action automatically is deemed to

infringe on the teacher's first amendment rights. *See, e.g., Simard* v. *Board of Education of Town of Groton*, 473 F. 2d 988 (2d Cir. 1973).

It should be noted that the orientation day address was not made at a meeting of the teacher's association and did not concern the subject matter of negotiations then going on between the teachers and the administration. Rather, as the petitioner herself pointed out, the labor negotiations had already been successfully resolved. Thus, the petitioner's statements transcended the prior labor difficulties between the parties and reached the level of a vituperative and intemperate personal attack on the superintendent. Since the statements of the petitioner were directed toward a person with whom she would normally be in contact, her comments threatened to disrupt the operation of the school system. Therefore, these statements were not protected by the first amendment. This conclusion is supported by the recent district court decision of *Magri* v. *Giarrusso*, 379 F. Supp. 353 (E. D. La. 1974). In *Magri*, the court held that a police officer, who was both a sergeant on the police force and the president of the policemen's union, did not have a protected right to make public statements pertaining to the superintendent of the police department when such statements were insubordinate, bordered on the defamatory, vitriolic, and threatened significant working relationships vital to the administration of the police department. The court recognized that responsible public criticism of public officials should be encouraged; however, the court held that vitriolic remarks which threatened the efficiency of the public services performed were outside the scope of protected speech. While recognizing that, as union president, the permissible extent of the plaintiff's criticism may be greater, the court concluded that the plaintiff's criticism in the capacity of union

president has limits implicit in his status as a member of the police department, such limits being overreached by his vitriolic remarks. Similarly, the present petitioner's position as union president did not offer her absolute protection for remarks that threatened the operation of the school system.

The petitioner's use of the "defamation" analogy is inapposite to the instant case. As this Court stated in *Pickering*:

> We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public officer for similar criticism.

391 U. S. at 574.

Pickering holds that the "actual malice" standard of "false statements knowingly or recklessly made" is to be applied in teacher dismissal cases only after the court has preliminarily concluded that the teacher's interest in speaking out on matters of public concern outweighs the state's interest in protecting the public services it performs. If the balancing test is resolved in favor of the school board, as it should in the instant case, the Court need not consider the "actual malice" test.

II.

There is no conflict of decisions.

Since the petitioner's remarks were outside the ambit of first amendment protection, under the *Pickering* balancing test her dismissal did not violate either her right

of association or the right of association of those whom she represented as president of the union. Lower court cases which arguably support an opposite conclusion are inapplicable and not in conflict with the instant case. In other cases, none of the indicia articulated in *Pickering* which would take the statements out of the sphere of protected activity were present. As discussed above, several of these factors are present in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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